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1877

73-76
No. 12212

United States
Court of Appeals
for the Ninth Circuit

SHOSO NIL,

Appellant,

vs.

J. HOWARD McGRATH, Attorney General, as Successor
to the Alien Property Custodian,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Territory of Hawaii

FILED

JUN 9 - 1949

PAUL P. O'BRIEN,
CLERK

No. 12212

United States
Court of Appeals
for the Ninth Circuit

SHOSO NII,

Appellant,

vs.

TOM C. CLARK, Attorney General, as Successor
to the Alien Property Custodian,

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Transcript of Record

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NAMES AND ADDRESSES OF ATTORNEYS

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Honolulu 48, T.H.

For the Defendant,

TOM C. CLARK,

United States Attorney,
District of Hawaii,
Federal Building,
Honolulu, T.H.,

and

LEON R. GROSS, Esq.,

Yokohama Specie Bank Building,
Honolulu, T.H. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the
Territory of Hawaii

Civil No. 837

SHOSO NII,

Plaintiff,

vs.

TOM C. CLARK, Attorney General as Successor
to the Alien Property Custodian,

Defendant.

COMPLAINT

To the Honorable the Judges of the United States
District Court for the Territory of Hawaii:

Comes now Shoso Nii, plaintiff above named, and
alleges as follows:

I.

That the ground upon which the jurisdiction of
this Court is involved and depends is as follows:

This is an action against the Attorney General as
successor to the Alien Property Custodian involv-
ing the return of a parcel of real property valued in
excess of \$30,000.00 brought under the Trading with
the Enemy Act, as amended, 50 U. S. C. A. Sec. 9
(a) and also for ancillary equitable relief arising
out of the same matter in conjunction therewith.

II.

That the plaintiff, Shoso Nii, was for more than
33 years next preceding the date hereof and is a
permanent resident of Waipahu, Oahu, City and
County of Honolulu, Territory of Hawaii, United

States of America; and that the plaintiff is not an "enemy" or an "ally of enemy" as the terms are defined in the Trading with the Enemy Act. [7]

III.

That the plaintiff was born at Waipahu aforesaid on the 3rd day of January, 1914, and by virtue of his birth within the jurisdiction of the United States of America is a citizen of the United States; and that he has continuously since the date of his birth to the date hereof kept and maintained his status as a citizen of the United States of America.

IV.

That the defendant, Tom C. Clark, was, at the time of the issuance of the Vesting Order hereinafter mentioned, and is now the Attorney General of the United States of America, the duly appointed successor to the Alien Property Custodian acting and purporting to act pursuant to the authority vested in him by the Trading with the Enemy Act as amended and Executive Order No. 9095 as amended.

V.

That the plaintiff's father is Kaneichi Nii; that said Kaneichi Nii is a citizen of Japan and has been continuously residing in Japan since May, 1935, to the date hereof; that prior to on or about May, 1935, said Kaneichi Nii resided for a long period of time at Waipahu aforesaid and operated a general merchandise store known as the "K. Nii Store" at Waipahu aforesaid; that due to his business ability, hard work and thrifty habits said Kaneichi Nii ac-

quired considerable real property holdings in Wai-pahu aforesaid and accumulated a sizeable estate for himself; that in May of 1935 said Kaneichi Nii decided to retire from active business and returned to Japan; that at the time he returned to Japan he left and gave by way of gift everything he left in the Territory of Hawaii to his only son, the [8] plaintiff herein; and that the general merchandise store was turned over to the plaintiff by a duly executed bill of sale.

VI.

That among the real properties left and given to the plaintiff was the following:

All of that certain parcel of land (portion of the land described in Royal Patent Number 5694, Land Commission Award Number 6545, Apana 1 to H. Haalilio and a portion of Boundary Certificate No. 20 to John Hamauku) situate, lying and being at Ohua, Waikele, in the District of Ewa, City and County of Honolulu, Territory of Hawaii, being Lot "4", and thus bounded and described:

Parcel No. 1

Beginning at the Southeast corner of this piece of land on the West bank of the Kapakahi Stream, being also the Northeast end of present wooden bridge, the true azimuth and distance of the said point to a pipe driven at the Northwest corner of Lot 10, Land Court Application 779 being $339^{\circ} 06' 28.75$ feet, and running by azimuths measured clockwise from true South:

1. $105^{\circ} 50'$ 170.00 feet along the North side of right of way;

2. $15^{\circ} 50'$ 14.80 feet along the West end of right of way;

3. $105^{\circ} 50'$ 105.80 feet along the remaining portion of R. P. 5694 L. C. Aw. 6545 Apana 1 to Haalilio, to a pipe;

4. $199^{\circ} 50'$ 140.10 feet along the same, to a pipe;

5. $294^{\circ} 16'$ 218.60 feet along the South bank of the Kapakahi Stream;

6. $311^{\circ} 48'$ 25.54 feet along the West bank of the Kapakahi Stream;

7. $348^{\circ} 10'$ 61.30 feet along the West bank of the Kapakahi Stream;

8. $19^{\circ} 14'$ 27.50 feet along the West bank of the Kapakahi Stream, to the point of beginning.

Containing an Area of 29,200 square feet, or 0.670 Acre, or thereabouts.

Together with fifty per cent (50%) of additional undivided interest of right of way to use in common with the owners and occupants of the above-mentioned lot and the remaining portion of L. C. Aw, 6545 Apana 1 to H. Haalilio being a road purpose only, which right of way is described as follows: [9]

Beginning at the Northeast corner of this piece of land on the West bank of Kapakahi Stream, the true azimuth and distance of the said point of beginning to a pipe driven at the Northwest corner of Lot 10 of Land Court Application 779 beginning $339^{\circ} 06'$ 28.75 feet and running by azimuths measured clockwise from true South:

1. $339^{\circ} 06'$ 17.46 feet along the West bank of the Kapakahi Stream;

2. $105^{\circ} 50'$ 41.04 feet;

3. 195° 50' 14.80 feet;
4. 285° 50' 30.00 feet to the point of beginning and containing an area of 526 square feet.

that the property afore described is situated at Waipahu aforesaid and that there are three valuable buildings on the said property.

VII.

That with relation to the real property afore described in paragraph VI although it was orally given to the plaintiff, there was never a deed executed in favor of the plaintiff from his father; that subsequent to May, 1935, for more than ten (10) continuous years the plaintiff took possession of the premises and openly, exclusively, adversely, continuously and without interruption held himself to be the owner of the premises aforescribed against the entire world; that since May, 1935, he possessed said property and collected all rentals due from the premises and kept the said rentals for his own use; that since May, 1935, he paid all Territorial real property taxes on the premises; that since May, 1935, he considerably improved the premises with permanent improvements at his own labor and expense; that since May, 1935, he controlled the property in every respect as if he owned the property; that since May, 1935, he paid gross income taxes to the Territory of Hawaii in his own name on the gross rentals from the premises; that since May, 1935, he paid in his own name net income taxes, both Territorial and Federal, on the rental income from the premises;

that on July 23, 1938, he purchased from one T. Ota for the sum of \$100.00 by way of a [10] deed duly executed by T. Ota, parcel 2 described in the Vesting Order, the exact description of which is as follows:

All of that certain parcel of land (portion of the land described in Royal Patent Number 5694, Land Commission Award Number 6545, Apana 1 to H. Haalilio and a portion of Boundary Certificate No. 20 to John Hamauku) situate, lying and being at Ohua, Waikele, in the District of Ewa, City and County of Honolulu, Territory of Hawaii, and thus bounded and described:

Parcel No. 2

Beginning at the Northeast corner of this piece of land the true azimuth and distance of the said point of beginning from a pipe driven at the Northwest corner of the Lot 10, Land Court Application 779, by traverse, being: (a) $159^{\circ} 06' 28.75$ feet and (b) $105^{\circ} 50' 30.0$ feet and running by azimuths measured clockwise from true South:

1. $15^{\circ} 50' 14.8$ feet;
2. $105^{\circ} 50' 140.0$ feet;
3. $195^{\circ} 50' 14.8$ feet;
4. $285^{\circ} 50' 140.0$ feet to the point of beginning.

Containing an Area of 2,072 square feet, or thereabouts.

that it was put in the name of Kaneichi Nii because the adjoining parcel 1 was in the name of Kaneichi Nii and since parcel 1 was by way of gift already his, the plaintiff thought that no harm would be

done in naming as grantee said Kaneichi Nii; that the foregoing acts were all in reliance of the gift of the said real property to him in May, 1935; and that Kaneichi Nii held said Parcel 2 in trust for plaintiff.

VIII.

That there were other real properties in Waipahu left by gift to the plaintiff by his father in May, 1935, which were also parol gifts unsupported by deeds, but plaintiff in 1939 using powers of attorney from Kaneichi Nii and Saku Nii, wife of said Kaneichi Nii, sold said parcels and collected all proceeds from the sale of the said property for his own use and purpose. [11]

IX.

That at the time of the gift in May, 1935, to the plaintiff, the property aforedescribed in paragraph VI being situated in a remote part of Waipahu was not of much value; that plaintiff could have sold said properties described in paragraphs VI and VII as in the case of the property described in paragraph VIII and invested said funds to his own use but instead kept the properties; that on or about 1940 four-laned paved highways have been constructed near the said properties and the value of the properties now is about ten times that of May, 1935; that its present value is about \$30,000.00 more or less; that if the properties described are not returned as prayed for in this cause to the plaintiff, the plaintiff will suffer great and irreparable damages; that plaintiff is and was since May, 1935, the beneficial and equitable owner of the premises de-

scribed; and that he is also entitled to the premises on grounds of adverse possession.

X.

That heretofore, to wit, on September 12, 1947, the defendant in his capacity as successor to the Alien Property Custodian of the United States of America issued Vesting Order No. 9777, an exact copy of which Order is attached hereto and marked Exhibit "A" and hereby incorporated herein as if recited herein.

XI.

That by virtue of said Order the said properties are now vested in the defendant, Attorney General of the United States of America in his capacity as successor to the Alien Property Custodian, and the plaintiff has been illegally deprived of his properties by said Vesting Order; that since the issuance of the said Order the defendant through his agents have been illegally, [12] unlawfully and contrary to law and the Constitution of the United States of America in complete control and possession of the premises collecting all rentals therefrom and will continue to do so, and plaintiff is informed and believes that defendant will sell said properties if the relief requested herein is not granted; and that such a sale would be illegal and contrary to the laws and the Constitution of the United States of America.

XII.

That the aforesaid wrongful and illegal possession, supervision and control of the properties have caused and will cause plaintiff irreparable damages.

XIII.

That the threatened sale of said real properties, if carried out, will cause irreparable damages to the plaintiff.

XIV.

That prior to the filing of this suit the plaintiff duly made and filed with the Office of the Alien Property Custodian at Washington, District of Columbia, notice of his claim to said real properties under oath on Form APC 1-A and in such form and in such particulars required by said Alien Property Custodian, in conformity with and in pursuance to the statutes, requirements, and orders in such cases made and provided; that no hearing has been granted in connection with such claim and plaintiff has been informed that no hearing will be granted immediately upon the filing of such claim; that he has been informed that the Office of the Alien Property Custodian has not acted on claims filed years ago and there is no reason to believe that plaintiff's claim will be acted upon immediately. [13]

XV.

That in addition to the vesting of the properties aforedescribed the defendant in his capacity as successor to the Alien Property Custodian, through his agents, has illegally and unlawfully made written demands on the plaintiff to pay:

“That certain debt or other obligation owing to Kaneichi Nii, also known as Konichi Nii by Shoso Nii, doing business as S. Nii Store, arising out of rents collected from the property de-

scribed in sub-paragraph 2-a hereof, and any and all rights to demand, enforce and collect the same.”

that plaintiff claims that since he was and is the beneficial and equitable owner of the premises as alleged in paragraphs V, VI, VII, IX, XI, XII and XIII, he did not and does not owe the debt above referred to in the Vesting Order to Kaneichi Nii or his successor the defendant; that in spite of such claims of the plaintiff the defendant through his agents have insisted on the payment of the alleged debt; that the amount of the alleged debt claimed by the defendant through his agent is approximately \$3,500.00 to \$4,000.00; that if the defendant unlawfully, forcibly and summarily collects said alleged debt, the plaintiff will be required to liquidate his store business in that he does not have sufficient cash to pay such a large sum of money; that if the relief as prayed for with relation to the matters alleged in this paragraph is not granted, the plaintiff will be permanently and irreparably damaged.

XVI.

That the plaintiff claims that the matters of the return of properties herein alleged and the matter of the existence or non-existence of the debt alleged in paragraph XV is so closely related that it should be settled in this single cause. [14]

XVII.

That plaintiff has no adequate and speedy remedy at law.

Wherefore, plaintiff prays that a summons be is-

sued out of this Court, directed to said Tom C. Clark, Attorney General as successor to the Alien Property Custodian, commanding him on a day certain, to appear and answer this bill of complaint as is by law provided, answer under oath being waived, and obey and perform such orders and decrees in the premises as to the Court may seem proper and required by the principles of equity and good conscience; and

The plaintiff prays that a decree be entered herein restraining the sale of the real properties described in paragraphs VI and VII above by the defendant as well as his agents, employees and representatives pending determination of this action; that it be adjudged that the right and title in said real properties are in the plaintiff and that said plaintiff is entitled to the immediate possession thereof; and directing defendant to transfer and deliver to the plaintiff said real properties and to render a full, true and correct accounting of moneys received and collected from September 12, 1947, to the date of the transfer.

And as further relief the plaintiff prays that a decree be entered herein permanently enjoining the defendant from collecting the alleged debt alleged in paragraph XV above; that an order be entered declaring that the entire Vesting Order No. 9777 to be a nullity and of no effect.

The plaintiff prays for such other, further and different relief as to this Court may seem equitable, just and proper. [15]

Dated at Honolulu, T. H., this 31st day of December, A.D. 1947.

/s/ SHOSO NII.

His Attorney:

/s/ SHIRO KASHIWA.

Territory of Hawaii,
City and County of Honolulu—ss.

Shoso Nii, being first duly sworn, on oath, deposes and says: That he is the Plaintiff named in the foregoing Complaint; that he has read the same, knows the contents thereof and that the same are true.

/s/ SHOSO NII.

Subscribed and sworn to before me this 31st day of December, A. D. 1947.

(Seal) /s/ FLORENCE Y. OKUBO,

Notary Public, First Judicial Circuit, Territory of Hawaii. [16]

EXHIBIT "A"

Office of Alien Property
Department of Justice
Vesting Order 9777

Re: Real property and a claim owned by Kaneichi Nii, also known as Konichi Nii

Under the authority of the Trading with the Enemy Act, as amended Executive Order 9193, as amended, and Executive Order 9788, and pursuant to law, after investigation, it is hereby found:

1. That Kaneichi Nii, also known as Konichi Nii,

whose last known address is Japan, is a resident of Japan and a national of a designated enemy country (Japan);

2. That the property described as follows:

(A.) Real property situated at Waikale, Waipahu, Oahu, T. H., particularly described in Exhibit A attached hereto and by reference made a part hereof, together with all hereditaments, fixtures, improvements and appurtenances thereto and any and all claims for rents, refunds, benefits or other payments arising from the ownership of such property, and

(B.) That certain debt or other obligation owing to Kaneichi Nii, also known as Konichi Nii by Shoso Nii, doing business as S. Nii Store, arising out of rents collected from the property described in sub-paragraph 2-a hereof, and any and all rights to demand, enforce and collect the same.

is property within the United States owned or controlled by, payable or deliverable to, hold on behalf of or on account of, or owing to, or which is evidence of ownership or control by, the aforesaid national of a designated enemy country (Japan);

and it is hereby determined:

3. That to the extent that the person named in sub-paragraph 1 hereof is not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Japan)

All determinations and all action required by law, including appropriate consultation and certification, having been made and taken, and, it being deemed necessary in the national interest, [17]

There Is Hereby Vested in the Attorney General of the United States the property described in subparagraph 2-a hereof, subject to recorded liens, encumbrances and other rights of record held by or for persons who are not nationals of designated enemy countries, and

There Is Hereby Vested in the Attorney General of the United States the property described in subparagraph 2-b hereof,

All such property so vested to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

The term "national" and "designated enemy country" as used herein shall have the meanings prescribed in section 10 of Executive Order 9193, as amended.

(40 Stat. 411, 50 U.S.C. App. 1; 55 Stat. 839, 50 U.S.C. App. Sup. 616; Pub. Law 322, 79th Cong., 60 Stat. 50; Pub. Law 671, 79th Cong., 60 Stat. 925; E. O. 9193, July 6, 1942, 9193, July 6, 1942, 7 F. R. 5205, CFR, Cum, Supp.; E. O. 9567 June 8, 1945, 10F. R. 6917, 3 CFR, 1945 Supp.; E. O. 9788, Oct. 14, 1946, 11 F. R. 11981)

Executed at Washington, D. C., on September 12, 1947.

For the Attorney General:

(Official Seal.)

/s/ DAVID L. BAZELON,
Assistant Attorney General, Director, Office of Alien
Property. [18]

EXHIBIT A

All of that certain parcel of land (portion of the land described in Royal Patent Number 5694, Land Commission Award Number 6545, Apana 1 to H. Haalilio and a portion of Boundary Certificate No. 20 to John Hamauku) situate, lying and being at Ohua, Waikele, in the District of Ewa, City and County of Honolulu, Territory of Hawaii, being Lot "4", and thus bounded and described:

Parcel No. 1

Beginning at the Southeast corner of this piece of land on the West bank of the Kapakahi Stream, being also the Northeast end of present wooden bridge, the true azimuth and distance of the said point to a pipe driven at the Northwest corner of Lot 10, Land Court Application 779 being $339^{\circ} 06' 28.75$ feet, and running my azimuths measured clockwise from true South:

1. $105^{\circ} 50'$ 170.00 feet along the North side of right of way;

2. $15^{\circ} 50'$ 14.80 feet along the West end of right of way;

3. $105^{\circ} 50'$ 105.80 feet along the remaining portion of R. P. 5694 L.C. Aw. 6545 Apana 1 to Haalilio, to a pipe;

4. $199^{\circ} 50'$ 140.10 feet along the same, to a pipe;
5. $294^{\circ} 16'$ 218.60 feet along the South bank of the Kapakahi Stream;
6. $311^{\circ} 48'$ 25.54 feet along the West bank of the Kapakahi Stream;
7. $348^{\circ} 10'$ 61.30 feet along the West bank of the Kapakahi Stream.
8. $19^{\circ} 14'$ 27.50 feet along the West bank of the Kapakahi Stream, to the point of beginning

Containing an Area of 29,200 Square Feet, or 0.670 Acre, or thereabouts. [19]

All of that certain parcel of land (portion of the land described in Royal Patent Number 5694, Land Commission Award Number 6545, Apana 1 to H. Haalilio and a portion of Boundary certificate No. 20 to John Hamauku) situate, lying and being at Ohua, Waikele, in the District of Ewa, City and County of Honolulu, Territory of Hawaii and thus bounded and described:

Parcel No. 2

Beginning at the Northeast corner of this piece of land the true azimuth and distance of the said point of beginning from a pipe driven at the Northwest corner of the Lot 10, Land Court Application 779, by traverse, being; (a) $159^{\circ} 06'$ 28.75 feet and (b) $105^{\circ} 50'$ 30.0 feet and running by azimuths measured clockwise from true South:

1. $15^{\circ} 50'$ 14.8 feet;
2. $105^{\circ} 50'$ 140.0 feet;
3. $195^{\circ} 50'$ 14.8 feet;
4. $285^{\circ} 50'$ 140.0 feet to the point of beginning.

Containing an Area of 2,072 Square Feet, or thereabouts.

Together with fifty per cent (50%) of additional undivided interest of right of way to use in common with the owners and occupants of the above-mentioned lot and the remaining portion of L.C. Aw. 6545 Apana 1 to H. Haalilio being a road purpose only, which right of way is described as follows:

Beginning at the Northeast corner of this piece of land on the West bank of Kapakahi Stream, the true azimuth and distance of the said point of beginning to a pipe driven at the Northwest corner of Lot 10 of Land Court Application 779 being $339^{\circ} 06'$ 28.75 feet and running by azimuths measured clockwise from true South:

1. $339^{\circ} 06'$ 17.46 feet along the west Bank of the Kapakahi Stream;
2. $105^{\circ} 50'$ 41.04 feet;
3. $195^{\circ} 50'$ 14.80 feet;
4. $285^{\circ} 50'$ 30.00 feet to the point of beginning and containing an area of 526 square feet. [20]

[Title of District Court and Cause]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Shiro Kashiwa, plaintiff's attorney, whose address is 307-208 Hawaiian Trust Building, Honolulu 48, T. H., an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the

day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

(Seal) /s/ WM. F. THOMPSON JR.,
 Clerk of Court.

Date: Jan. 5, 1948. [21]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 5th day of January, A.D. 1948, I received the within summons at Honolulu, T. H., and executed the same by handing to and leaving with Maurice Sapienza, Honolulu, T. H., Assistant United States Attorney, District of Hawaii, certified copy of the within Summons together with a certified copy of the Complaint attached thereto, at the Federal Building, Honolulu, T. H., and by mailing certified copies of the within Summons and Complaint to Hon. Tom C. Clark, Attorney General of the United States, as Successor to the Alien Property Custodian, at Washington 25, D. C., return receipt requested.

Dated at Honolulu, T. H., this 5th day of January, A. D. 1948.

(Seal) OTTO F. HEINE,
 United States Marshal,
By /s/ EMMANUEL U. MOSES, JR.,
 Deputy United States Marshal.

Marshal's Fees, \$4.06; Total, \$4.06.

(Return Post Office Receipt attached.)

[Endorsed]: Filed Jan. 5, 1948.

[Title of District Court and Cause.]

ANSWER

The defendant, Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, for his answer to the Complaint:

1. Admits that this is an action against the Attorney General of the United States as successor to the Alien Property Custodian and that it purports to arise under the Trading with the Enemy Act, as amended, and except as thus expressly admitted, denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the Complaint.

2. Denies that the plaintiff is not an "enemy" within the meaning of the Trading with the Enemy Act, as amended, and except as thus expressly denied, denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of the Complaint.

3. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III of the Complaint.

4. Admits the allegations contained in paragraph IV of the Complaint.

5. Admits that the plaintiff's father is Kaneichi Nii, that the said Kaneichi Nii is a citizen of Japan who has been resident in Japan [23] since May, 1935, that prior thereto the said Kaneichi Nii had resided

at Waipahu and operated a store known as "K. Nii Store," and that the said Kaneichi Nii, in or about May, 1935, conveyed the said store to the plaintiff by bill of sale; denies that the said Kaneichi Nii gave to the plaintiff by way of gift everything which he left in the territory of Hawaii; and, except as thus expressly admitted and denied, denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V of the Complaint.

6. Denies that the real property described in paragraph VI of the Complaint was left or given to the plaintiff and, except as thus expressly denied, admits the allegations contained in the said paragraph of the Complaint.

7. Admits that there was never a deed executed in favor of the plaintiff by his father with respect to the real property described in paragraph VI of the Complaint; admits further that the real property described in paragraph VII of the Complaint was conveyed by deed to Kaneichi Nii; and, except as thus expressly admitted, denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VII of the Complaint.

8. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII of the Complaint.

9. Denies that the plaintiff is and was since May, 1935, the beneficial and equitable owner of the prem-

ises described in paragraphs VI and VII of the Complaint; denies further that the plaintiff is entitled to the premises on grounds of adverse possession; and, except as thus expressly denied, denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IX of the Complaint.

10. Admits the allegations contained in paragraph X of the Complaint. [24]

11. Admits that the defendant by his agents has been and is in possession of the premises and has been and is collecting the rents, and that it will be the duty of the defendant to sell the premises according to law, and except as thus expressly admitted, denies the allegations in paragraph XI of the Complaint.

12. Denies that the defendant's possession, supervision and control of the property are wrongful or illegal and, except as thus expressly denied, denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XII of the Complaint.

13. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XIII of the Complaint.

14. Admits that the plaintiff filed with the Office of Alien Property, at Washington, D. C., under oath a claim to the property on Form APC-1A; admits further that no hearing has been granted on the

said claim and that the plaintiff has been informed that it is not possible to state when a hearing will be held on the said claim; and, except as thus expressly admitted, denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XIV of the Complaint.

15. Admits that the defendant has demanded and demands that the plaintiff pay the debt as set forth in the vesting order and in paragraph XV of the Complaint; denies that the said demand for payment is illegal; and, except as thus expressly admitted and denied, denies that he has knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph XV of the Complaint.

16. Alleges that paragraph XVI of the Complaint contains no material allegations of fact and, therefore, requires no answer.

17. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XVII of the Complaint. [25]

For a First, Separate and Complete Defense, the Defendant Alleges:

18. That the plaintiff was a resident of Japan after June 14, 1941, and at the time of the issuance of the vesting order herein, and that he is an enemy and a national of a designated enemy country within the meaning of the Trading with the Enemy Act, as

amended, and Executive Order No. 9193, as amended.

For a Counterclaim Against the Plaintiff, the Defendant Alleges:

19. That the Court has jurisdiction of this counterclaim under Section 24(1) of the Judicial Code (28 USC Sec. 41(1)) and Section 17 of the Trading with the Enemy Act, as amended (50 U.S.C., App., Sec. 17).

20. That by virtue of Vesting Order No. 9777, dated September 12, 1947, a copy of which is incorporated in the plaintiff's Complaint as Exhibit "A" thereto, the defendant became and is the owner of:

"That certain debt or other obligation owing to Kaneichi Nii, also known as Konichi Nii, by Shoso Nii, doing business as S. Nii Store, arising out of rents collected from the property described in subparagraph 2-a hereof, and any and all rights to demand, enforce and collect the same."

21. That although the defendant has made demand upon the plaintiff for the payment of the aforesaid debt, the plaintiff has refused to pay it.

Wherefore, the defendant demands judgment against the plaintiff (1) dismissing the plaintiff's Complaint; (2) ordering the plaintiff to account for all rents collected by him from the property described in the vesting order, together with interest, and to pay such rents and interest thereon to the defendant; and (3) for costs. [26]

Honolulu, T. H., May 3, 1948.

/s/ RAY J. O'BRIEN,
United States Attorney,

/s/ DAVID L. BAZELON,
Assistant Attorney General, Director, Office of Alien
Property,

/s/ GEORGE B. SEARLS,
Chief Trial Attorney,

/s/ HAROLD UNGAR,
Attorney, Department of Justice, Washington, D. C.
Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed May 3, 1948. [27]

[Title of District Court and Cause.]

ANSWER TO COUNTER-CLAIM

Comes now Shoso Nii, Plaintiff above named, and in answer to the Counter-claim of the defendant contained in the defendant's answer to the plaintiff's complaint, hereby denies that there was any debt owing from the plaintiff to Kaneichi Nii, also known as Konichi Nii, arising out of rents collected from the property described in sub-paragraph 2-a of the Vesting Order No. 9777 dated September 12, 1947.

Dated at Honolulu, T. H., this 4th day of May, A.D. 1948.

SHOSO NII,
Plaintiff.

By /s/ SHIRO KASHIWA,
His Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed May 6, 1948. [29]

[Title of District Court and Cause.]

MOTION FOR ISSUANCE OF COMMISSION TO TAKE DEPOSITION

Comes now Shoso Nii, Plaintiff in the above-entitled cause, by his attorney, Shiro Kashiwa, and moves this Honorable Court that a commission issue out of and under the seal of this Honorable Court directed to the Consul of the United States of

America at Kobe, Hyogo Prefecture, Japan, to take the testimony of Kaneichi Nii, whose address is 125 Kono Mura, Saiki Gun, Hiroshima Ken, Japan, as a witness for and on behalf of the Plaintiff above mentioned at any hearing that may be held on the Petition of the Plaintiff and the Counter-Claim by the Defendant filed in the above-entitled cause and matter and to propound written interrogatories and cross-interrogatories, if any, to said Kaneichi Nii and record his answers to the same.

This motion is based on the records and pleadings on file in the above-entitled cause and matter and particularly upon the Affidavit of Shiro Kashiwa attached hereto and made a part hereof. [31]

Dated at Honolulu, T. H., this 10th day of May, A.D. 1948.

SHOSO NII,

Plaintiff.

By /s/ SHIRO KASHIWA,

His Attorney.

NOTICE OF MOTION

Please take notice that the above Motion will be presented to the Honorable J. Frank McLaughlin at the hour of 10:00 o'clock a.m., on Wednesday, the 12th day of May, 1948, or as soon thereafter as counsel may be heard, in his Courtroom in the Federal Building, Honolulu, T. H.

/s/ SHIRO KASHIWA,

Attorney for Plaintiff. [32]

AFFIDAVIT OF SHIRO KASHIWA

Territory of Hawaii,
City and County of Honolulu—ss.

Shiro Kashiwa, being first duly sworn, on oath deposes and says: That he is an attorney at law, an officer of this Court, and that he acts as attorney for the Plaintiff in the above-entitled cause; that said Kaneichi Nii named in the foregoing Motion is a necessary and material witness for and in behalf of the plaintiff in any hearing that may be held on the petition filed in the above-entitled cause and matter as well as on the counterclaim of the defendant; that affiant has been informed and believes and upon such information and belief states the fact to be that said Kaneichi Nii if called at a hearing on said petition would testify in substance as follows:

That prior to his last departure from Hawaii to Japan he made a gift of any and all properties of whatever nature whatsoever, including real properties, to the plaintiff, Shoso Nii; [33]

That the affiant further alleges and states the fact to be that insofar as it is known to the affiant there is no other witness or witnesses (except the Plaintiff himself) known to the affiant residing in the Territory of Hawaii by whom the foregoing facts could be proved; that said Kaneichi Nii because of his residency at Hiroshima Ken, Japan, as aforesaid, will be unable to appear in Court at the hearing of the petition heretofore filed; that the Plaintiff cannot safely proceed with the

hearing without the testimony of said Kaneichi Nii; and further affiant sayeth not, save and except that he makes this affidavit in support of the foregoing motion for issuance of commission to take a deposition of Kaneichi Nii.

/s/ SHIRO KASHIWA.

Subscribed and sworn to before me this 10th day of May, A.D. 1948.

[Seal] /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of
Hawaii. My Commission expires August 9,
1951.

(Acknowledgment of Service.)

[Endorsed]: Filed May 11, 1948. [34]

[Title of District Court and Cause.]

ORDER OF MOTION FOR ISSUANCE OF
COMMISSION TO TAKE DEPOSITION

The motion filed on behalf of Shoso Nii, Plaintiff above mentioned, for a commission to take the deposition of Kaneichi Nii having duly come on to be heard and it appearing to the satisfaction of the Court that said Kaneichi Nii is presently residing at Hiroshima Ken, Japan, and that the Plaintiff cannot safely proceed with the trial of said cause without the testimony of said Kaneichi Nii;

Now, Therefore, It Is Hereby Ordered that a commission issue out of and under the seal of this Court directed to the Consul of the United States of America at Kobe, Hyogo Prefecture, Japan, to take the testimony of said Kaneichi Nii whose address is 125 Kono Mura, Saiki Gun, Hiroshima Ken, Japan, as a witness for and on behalf of the Plaintiff above mentioned, said deposition to be taken within a reasonable time after the date of this Order, upon written interrogatories and cross-interrogatories, if any, to be then and there propounded to said Kaneichi Nii. [36]

It Is Further Ordered that the direct interrogatories to be propounded on behalf of the Plaintiff herein shall be filed within ten (10) days after entry of this Order; that the cross-interrogatories to be propounded on behalf of the Defendant shall be filed within Thirty (30) days after the filing of the Plaintiff's direct interrogatories; that re-direct interrogatories to be propounded on behalf

of the Plaintiff shall be filed within Ten (10) days after the filing of said cross-interrogatories; and that recross-interrogatories to be propounded on behalf of the Defendant shall be filed within Thirty (30) days after the filing of the Plaintiff's redirect interrogatories.

Dated at Honolulu, T. H., this 13th day of May, 1948.

/s/ J. FRANK McLAUGHLIN,
Judge of the Above-Entitled
Court.

Approved as to form:

TOM C. CLARK,
Attorney General, as Successor to the Alien Property Custodian, Defendant.

RAY J. O'BRIEN,
United States Attorney, District of Hawaii, Attorney for Defendant.

By /s/ EDWARD A. TOWSE,
Assistant United States Attorney, District of Hawaii.

[Endorsed]: Filed May 13, 1948. [37]

[Title of District Court and Cause.]

DEPOSITION OF KANEICHI NII TAKEN ON
BEHALF OF PLAINTIFF

United States of America—ss.

Kaneichi Nii, of 125 Kono Mura, Saiki Gun, Hiroshima Ken, Japan, residing more than one

hundred miles from the place where the trial of this action will occur, a witness called on behalf of the Plaintiff herein, being duly cautioned and sworn to testify the whole truth, and being carefully examined, deposes and says as follows: [39]

INTERROGATORIES TO BE PROPOUNDED
TO KANEICHI NII

1. Q. What is your name? A.
2. Q. Where do you reside? A.
3. Q. Are you the father of Shoso Nii who now resides at Waipahu, Oahu, Territory of Hawaii, United States of America? A.
4. Q. How old are you now? A.
5. Q. At what age did you go to Hawaii for the first time? A.
6. Q. How many years did you spend in Hawaii? A.
7. Q. When did you last come back from Hawaii to Japan? A.
8. Q. At the time you last came back from Hawaii to Japan how many children did you have? A.
9. Q. Will you name your children who are now living and give their present addresses?
A.
10. Q. When you last came back from Hawaii to Japan, did you transfer the Nii Store to your son Shoso Nii? A.
11. Q. If you did transfer the store, did you sign a bill of sale? A.
12. Q. Just prior to your last departure from

Hawaii to Japan, did you own any real properties in Hawaii? A.

13. Q. What did you do with all of your real properties in Hawaii when you last left Hawaii for Japan? A.

14. Q. When you last returned to Japan from Hawaii, did you have properties in Japan? A.

15. Q. At that time about how much was such property in Japan together with what you brought back from Hawaii on your last trip worth in Japanese yen? A.

16. Q. Was that sufficient to comfortably take care of you and your wife for the rest of your life and your wife's life? A.

17. Q. When you last left Hawaii for Japan was your daughter Hatsuko ill? A.

18. Q. Where was Hatsuko living at that time? A.

.....

Kaneichi Nii. [41]

CERTIFICATE BY CONSUL OF THE UNITED STATES OF AMERICA

United States of America—ss.

I hereby certify that on the day of, 1948, before me, Consul of the United States of America, at my office,, Japan, personally appeared, pursuant to the notice hereto annexed, between the hours of o'clock .. m. and .. o'clock .. m., Kaneichi Nii, the witness named in said notice, and the said Kaneichi Nii being by me first duly cautioned and sworn to testify the whole truth,

and being carefully examined, deposed and said as in the foregoing annexed deposition set out.

I further certify that said deposition was begun on the day of, 1948, and continued from day to day until the day, 1948, when same was completed. [42]

I further certify that the said deposition was then and there reduced to typewriting by me, and was, after it had been reduced to typewriting, subscribed by the witness, and the same has been retained by me for the purpose of sealing up and directing the same to the clerk of the court as required by law.

I further certify that the reason why the said deposition was taken was that the said witness resides at 125 Kono Mura, Saiki Gun, Hiroshima Ken, Japan, more than one hundred miles from Honolulu, Territory of Hawaii, the place where this cause is to be tried.

I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause.

I further certify that the fee for taking said deposition, \$. . . ., has been paid to me by the plaintiff, and the same is just and reasonable.

Witness my hand and official seal at,, Japan, this day, 1948.

.....

Consul of the United States
of America.

[Endorsed]: Filed May 21, 1948. [43]

[Title of District Court and Cause.]

COMMISSION

The United States of America,
District of Hawaii,
Hawaiian Division—ss.

The President of the United States, to the Consul
of the United States of America at Kobe, Hyogo
Prefecture, Japan,

Greeting:

Whereas there is now pending before us a certain action in which Shoso Nii is plaintiff and Tom C. Clark, Attorney General as Successor to the Alien Property Custodian, is defendant, and it has been made known to us that the testimony of a witness, Kaneichi Nii, residing at 125 Kono Mura, Saiki Gun, Hiroshima Ken, Japan, is necessary in order that full justice be done in the premises;

We therefore request that you cause the said witness to appear before you, or before some person by you for that purpose appointed, at a precise time and place, then and there to make answer on his oath or affirmation to the several interrogatories and cross-interrogatories hereunto annexed, and that you cause his deposition to be committed to writing, inclosed and sealed and returned to us, together with these present. [45]

Witness the Honorable J. Frank McLaughlin,

Judge of the District Court of the United States
for the Territory of Hawaii.

.....

Clerk.

Dated May 2, 1948.

Approved as to form:

TOM C. CLARK,

Attorney General, as Successor to the Alien Prop-
erty Custodian, Defendant.

RAY J. O'BRIEN,

United States Attorney, District of Hawaii, Attor-
ney for Defendant.

By EDWARD A. TOWSE,

Assistant United States Attorney, District of Ha-
waii. [46]

[Title of District Court and Cause.]

APPEARANCE OF COUNSEL

Comes now Leon R. Gross, Manager Hawaii Office, Office of Alien Property, Department of Justice, and enters his appearance as one of the attorneys for Tom C. Clark, Attorney General as Successor to the Alien Property Custodian, Defendant above named.

Dated: Honolulu, T. H., this 21st day of June, 1948.

/s/ LEON R. GROSS,

Manager, Hawaii Office, Office of Alien Property.

[Endorsed]: Filed July 21, 1948. [48]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR PRE- TRIAL EXAMINATION OF SHOSO' NII, PLAINTIFF

Come now Shoso Nii, Plaintiff, by Shiro Kashiwa, Esq., his attorney, and Tom C. Clark, Attorney General as Successor to the Alien Property Custodian, Defendant, by Ray J. O'Brien, United States Attorney, District of Hawaii, and Leon R. Gross, Esq., his attorneys, and stipulate that the testimony of Shoso Nii shall be taken at Honolulu, Territory of Hawaii, on the 22nd day of July, 1948, before Marie A. Davison, a Notary Public in and for the First Judicial Circuit of the Territory of Hawaii at the hour of 1:30 o'clock p.m. on

said day in Room No. 319 of the Post Office Building in said Honolulu, pursuant to Rule 26 and Rule 27 of the Rules of Civil Procedure for the District Courts of the United States; and that the testimony of the said Shoso Nii, given at said time and place, shall be recorded and transcribed by Albert Grain, Court Reporter for the United States District Court for the Territory of Hawaii, [50] and that all costs incurred by virtue of the foregoing be taxed as costs of these proceedings.

Dated: Honolulu, T. H., this 21st day of June, 1948.

SHOSO NII,
Plaintiff.

By /s/ SHIRO KASHIWA,
His Attorney.

TOM C. CLARK,
Attorney General as Successor to the Alien Property Custodian, Defendant.

By /s/ LEON R. GROSS,
One of His Attorneys.

The foregoing stipulation is hereby approved and allowed:

.....

Judge, United States District
Court.

[Endorsed]: Filed July 21, 1948. [51]

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF TIME
FOR FILING CROSS-INTERROGATORIES
ON BEHALF OF DEFENDANT TOM C.
CLARK, ATTORNEY GENERAL, AS SUC-
CESSOR TO THE ALIEN PROPERTY CUS-
TODIAN

It is hereby stipulated and agreed by and between Shoso Nii, Plaintiff, by Shiro Kashiwa, Esq., his attorney, and Tom C. Clark, Attorney General as Successor to the Alien Property Custodian, Defendant, by Ray J. O'Brien, United States Attorney, District of Hawaii, and Leon R. Gross, Esq., his attorneys, that the defendant may have to and including thirty days from and after the conclusion of the pre-trial examination of the plaintiff heretofore set to commence on the 22nd day of July, 1948, within which to file cross-interrogatories on behalf of the defendant herein pursuant to order of this Court dated the 13th day of May, 1948.

Dated: Honolulu, T. H., this 21st day of June, 1948.

Plaintiff.

By /s/ SHIRO KASHIWA,

His Attorney.

TOM C. CLARK,

Attorney General as Successor to the Alien Prop-
erty Custodian, Defendant.

By /s/ LEON R. GROSS,

One of His Attorneys.

Allowed:

/s/ J. FRANK McLAUGHLIN,
Judge, United States District Court, Territory of
Hawaii.

[Endorsed]: Filed July 21, 1948. [53]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

To: Shiro Kashiwa, 307 Hawaiian Trust Bldg.,
Honolulu 48, Hawaii, Attorney for Plaintiff:

You are hereby notified that on August 19th, 1948, at the opening of Court in the forenoon or as soon thereafter as counsel may be heard, we shall appear before His Honor, Judge J. Frank McLaughlin, in the room occupied by him as a Courtroom in the Federal Building, Honolulu, Territory of Hawaii, or in his absence before such other Judge as may be sitting in his place and stead and shall then and there request leave to file instanter a motion of the defendant Tom C. Clark, Attorney General of the United States, as Successor to the Alien Property Custodian, for a summary judgment pursuant to the Rules of Civil Procedure of the United States District Courts and shall then and there request leave to file an affidavit in support of said motion. [55]

At the time and place aforesaid you may appear,
if you see fit so to do.

RAY J. O'BRIEN,
United States Attorney,
District of Hawaii.

EDWARD A. TOWSE,
Assistant United States Attorney, District of
Hawaii.

LEON R. GROSS,
Attorneys for Tom C. Clark.

By /s/ LEON R. GROSS.

Receipt is hereby acknowledged of a copy of the
above and foregoing notice together with a copy of
the motion and affidavit therein referred to this 17th
day of August, 1948.

.....

[Endorsed]: Filed Aug. 18, 1948. [56]

[Title of District Court and Cause.]

MOTION TO STRIKE AFFIDAVIT OF
LEON R. GROSS

Comes now Shoso Nii, Plaintiff above named, by
his attorney, Shiro Kashiwa, and hereby moves to
strike the Affidavit of Leon R. Gross in support
of the Motion for Summary Judgment filed in the
above-entitled court and cause on the following
grounds:

I.

That in Paragraphs 5, 6, 7, 8, first sentence of paragraph 10, paragraph 12, with relation to the statement made in the abstract as to the title, Paragraphs 13, 16 and 17 of the Affidavit facts which are not in the personal knowledge of the affiant are stated all contrary to paragraph 56 (e) of the Rule of Civil Procedure.

II.

That the facts as stated in paragraphs 5, 6, 7, 8, first sentence of paragraph 10, paragraph 12 with relation to the statement made in the abstract as to the title, paragraphs 13, 16 and 17, are mere hearsay facts of which the affiant, Leon R. Gross, has no personal knowledge and is not competent to himself testify. [59]

III.

That the facts stated in the following paragraphs would not and cannot be competent evidence at the trial of this cause: All of paragraphs 4, 14, 15 and 16.

IV.

That none of the copies of the papers attached to the affidavit are properly certified as required by paragraph 56 (e) of the Rules of Civil Procedure.

Dated at Honolulu, T. H., this 21st day of August, A.D. 1948.

SHOSO NII,

Plaintiff.

By /s/ SHIRO KASHIWA,

His Attorney.

NOTICE OF MOTION

Please take notice that the foregoing Motion will be presented to the Honorable J. Frank McLaughlin at the hour of 10:00 o'clock a.m. on Tuesday, the 24th day of August, 1948, or as soon thereafter as counsel may be heard, in his Courtroom in the Federal Building, Honolulu, T. H.

Dated at Honolulu, T. H., this 21st day of August, 1948.

SHOSO NII,
Plaintiff.

By /s/ SHIRO KASHIWA,
His Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 23, 1948. [60]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Now comes Tom C. Clark, Attorney General as Successor to the Alien Property Custodian, defendant, by Ray J. O'Brien, Edward A. Towse and Leon R. Gross, his attorneys, and respectfully moves this Honorable Court to enter a summary judgment in this case in favor of the defendant, and in support of said motion files the affidavit of Leon R. Gross, one of the Attorneys herein.

TOM C. CLARK,
Attorney General, as Successor to the Alien Property Custodian, Defendant.

/s/ RAY J. O'BRIEN,

By /s/ EDWARD A. TOWSE,
United States Attorneys,
District of Hawaii.

/s/ EDWARD A. TOWSE,
Assistant United States Attorney, District of
Hawaii.

/s/ LEON R. GROSS,
Attorney.

[Endorsed]: Filed Aug. 24, 1948. [62]

[Title of District Court and Cause.]

AFFIDAVIT OF LEON R. GROSS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

County and County of Honolulu,
Territory of Hawaii—ss.

Leon R. Gross, being duly sworn, upon his oath deposes and states:

1. He is one of the Attorneys of Record for Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, defendant herein, and is duly authorized to make this affidavit.

2. Affiant is admitted to practice in the Federal District Court for the Territory of Hawaii.

3. Affiant was, effective May 15, 1948, appointed as Manager for the Hawaii office, Office of Alien Property, Department of Justice, and is presently acting in such capacity.

4. Affiant has studied the files and records of the Department of Justice in the instant law suit. On July 22, 1948, affiant examined the plaintiff, Shoso Nii, under oath, pursuant to Rule 26 of the Rules of Civil Procedure for the District Courts of the United States. Affiant has also caused extended investigation to be made of the facts involved in the controversy, and, based upon his investigation, examination and [65] knowledge, alleges the following facts which affiant claims are undisputed and are legally sufficient for this Honorable Court to enter a summary judgment for the defendant.

5. Kaneichi Nii, plaintiff's father, and a citizen of Japan, resided in Honolulu, Territory of Hawaii, for many years. In 1935 Kaneichi Nii returned to Japan and has resided in Japan until the present date. During his residence in Honolulu, Kaneichi Nii acquired certain property located at Waipahu, Oahu, Territory of Hawaii (hereinafter more specifically described).

6. On January 2, 1933, Kaneichi Nii executed a bill of sale in favor of his son Shoso Nii, the plaintiff herein, for, "That certain store in Waipahu, aforesaid known as "K. Nii Shoten," together with all of the automobiles, furnitures, fixtures, goods, wares and merchandise, books and accounts receivable, now being in and used in that certain store, aforesaid." Said bill of sale was recorded in Liber 1205, page 26 of record, on May 26, 1933, in the Office of the Registrar of Conveyances. A copy of the bill of sale is attached hereto as "Exhibit 1."

7. On the 27th day of December, 1932, Kaneichi Nii purchased from T. Ota and Yosu Ota, his wife, a parcel of real estate located in Waipahu, Oahu, and the property was conveyed by deed dated December 27, 1932, from T. Ota and Yosu Ota, his wife, to Kaneichi Nii. The deed was recorded in the Office of the Registrar of Conveyances in Liber 1189, page 91, on December 27, 1932. A copy of said deed is attached hereto and made a part hereof as "Exhibit 2." [66]

8. On the 23rd day of July, 1938, Kaneichi Nii purchased from T. Ota, a parcel of real estate located in Waipahu, Oahu, and the parcel was con-

veyed by deed dated July 23, 1938, from T. Ota and Yosu Ota, his wife, to Kaneichi Nii, recorded July 23, 1938, in Liber 1451, page 418, of records in the Office of the Registrar of Conveyances. A copy of said deed is attached hereto and made a part hereof as "Exhibit 3."

9. By Vesting Order dated September 12, 1947, being number 9777, the Attorney General of the United States as Successor to the Alien Property Custodian under the Authority of the Trading with the Enemy Act, as amended, vested the parcels of real estate referred to in paragraphs 7 and 8 above as property of Kaneichi Nii, a resident and a national of Japan. A copy of said Vesting Order is attached to the complaint filed herein and incorporated herein by reference as "Exhibit 4."

10. Shoso Nii, the plaintiff herein and son of Kaneichi Nii, was born in Waipahu, Oahu, on January 3, 1914, and left the Hawaiian Islands for Japan in July, 1941. Shoso Nii lived in Japan during all the intervening period from July, 1941, and returned to the Territory of Hawaii on November 8, 1947. On January 5, 1948, the plaintiff filed the instant suit under Section 9(a) of the Trading with the Enemy Act, as amended and alleged among other things:

"That the plaintiff's father is Kaneichi Nii; that said Kaneichi Nii is a citizen of Japan and has been continuously residing in Japan since May, 1935, to the date hereof; that prior to on or about May, 1935, said Kaneichi Nii resided for a long period of time at Waipahu aforesaid and operated

a general merchandise store known as the "K. Nii Store" at Waipahu aforesaid; that due to his business ability, hard work and thrifty habits said Kaneichi Nii acquired considerable real property holdings in Waipahu aforesaid and accumulated a sizable estate for himself; that [67] in May of 1935 said Kaneichi Nii decided to retire from active business and returned to Japan; that at the time he returned to Japan he left and gave by way of gift everything he left in the Territory of Hawaii to his only son, the plaintiff herein; and that the general merchandise store was turned over to the plaintiff by a duly executed bill of sale."

11. In Paragraph VII of said complaint it is alleged:

"That with relation to the real property aforescribed in paragraph VI although it was orally given to the plaintiff, there was never a deed executed in favor of the plaintiff from his father."

12. The Office of Alien Property, Department of Justice, as Successor to the Alien Property Custodian, has in its possession an abstract of Makinney & Company, Abstractors, Honolulu, Territory of Hawaii, dated March 31, 1948, showing that prior to vesting the record title, to the subject real estate was in Kaneichi Nii (Exhibit 7).

13. As of February 7, 1939, Kaneichi Nii and Saku Nii, his wife, father and mother, respectively, of Shoso Nii, the plaintiff herein, executed before William C. Affeld, Jr., Vice Counsel of the United States at Kobe, Japan, their respective powers of attorney running to Shoso Nii, the plaintiff, which

powers of attorney are recorded in the Office of the Registrar of Conveyances for Honolulu, Territory of Hawaii, in Liber 1503, pages 190 to 197, inclusive. A copy of the powers of attorney are attached hereto and incorporated herein by reference as "Exhibit 5 and 6, respectively."

14. In the examination conducted on July 22, 1948, pursuant to Rule 26 of the Rules of Civil Procedure for the District Courts of the United States, the plaintiff Shoso Nii testified under oath as follows: [68]

Q. When you were over in Japan with your father from 1941 to 1947, did you at any time tell him that you had found out the title of this real estate was not in yourself? A. No, sir.

Q. You did not? A. No.

Q. And why didn't you?

A. Because I didn't find any necessity in the name being changed.

15. Affiant respectfully urges upon this Honorable Court that the undisputed facts which are matters of record, conclusively demonstrate that at the time of the service of Vesting Order Number 9777 the real estate and improvements which are the subject matter of this law suit were as described in said Vesting Order, "property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, the aforesaid national, Kaneichi Nii, of a designated

enemy country (Japan)'' and subject to being vested by the defendant pursuant to the powers conferred upon him by the Trading with the Enemy Act, as amended, and Executive Orders of the President of the United States issued pursuant thereto and in enforcement thereof.

16. The undisputed record shows that Kaneichi Nii did not give the plaintiff, his son Shoso Nii, the real estate in May, 1935, as alleged in the complaint filed herein. The undisputed facts further show that in 1938, after his return to Japan, when Kaneichi Nii purchased additional real estate, that title to the real estate was taken in the name of Kaneichi Nii and not in his son, the plaintiff herein. [69]

17. The undisputed facts further show that on date of February 7, 1939, Kaneichi Nii and his wife, Saku Nii, made, executed and delivered powers of attorney to their son, Shoso Nii, plaintiff herein, and on the effective date of the vesting order in this case in September, 1947, record title to the subject real estate was in Kaneichi Nii.

Affiant respectfully submits to this Court that the facts which are proven by instruments of record (exhibits to this affidavit) demonstrate conclusively that the plaintiff, Shoso Nii is not entitled to the relief prayed for in his complaint or any part thereof and that a judgment should be entered in favor of the defendant with costs assessed against the plaintiff.

/s/ LEON R. GROSS.

Subscribed to and sworn before me this 17th day of August, 1948.

(Seal) /s/ Illegible.

Deputy Clerk, United States District Court for the Territory of Hawaii. [70]

EXHIBIT No. 1

BILL OF SALE

Kaneichi Nii

Shoso Nii

Liber 1205, Page 26.

Know All Men by These Presents: That I, Kaneichi Nii, of Waipahu, City and County of Honolulu, Territory of Hawaii, being in conducting a general merchandise store known as "K. Nii Shoten," which situates in Waipahu, aforesaid, the party of the first part, for and in consideration of the sum of Ten Dollars (\$10.00), to him in hand paid by Shoso Nii, of the same place, the party of the second part, the receipt whereof is hereby acknowledged, and in consideration of love and affection, does hereby bargain, sell, assign, transfer and set over unto the said party of the second part, his heirs, executors, administrators and assigns that certain store in Waipahu, aforesaid known as "K. Nii Shoten" together with all of the automobiles, furniture, fixtures, goods, wares and merchandise, books and accounts receivable, now being in and used in that certain store, aforesaid.

To Have and to Hold the said property unto the party of the second part, his heirs, executors, admin-

istrators and assigns, for his and their own use and behoof forever.

And Shoso Nii, the party of the second part, as further consideration, does hereby agree to pay all of the accounts payable for goods, wares, and merchandise purchased, now owing by the party of the first part, in connection with the said business. [72]

In Witness Whereof the said parties hereunto set their hands and seal on this 2nd day of January, A. D. 1933.

/s/ Japanese Signature
(NII KANEICHI),
Party of the first part.

/s/ SHOSO NII,
Party of the second part.

Territory of Hawaii,
City and County of Honolulu—ss:

On this 2nd day of January, A. D. 1933, before me personally appeared Kaneichi Nii, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

(Seal) /s/ THOMAS J. WATARAI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 2nd day of January, A. D. 1933, before

me personally appeared Shoso Nii, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

(Seal) /s/ THOMAS J. WATARAI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Entered of Record this 26th day of May, A. D.
1933, at 8:30 o'clock a.m. and compared. Carl F.
Wikander, Registrar of Conveyances.

By /s/ Illegible,
Clerk. [73]

Bureau of Conveyances
Territory of Hawaii

Honolulu, Hawaii, August 5, 1948

The foregoing is a true photostatic copy of the record, recorded in the Bureau of Conveyances of the Territory of Hawaii, in liber 1205 on pages 26-27.

Attest:

(Seal) /s/ D. M. HUCHESTEIN,
Registrar of Conveyances for the Territory of
Hawaii. [74]

EXHIBIT No. 2

(Copy)

Liber 1189, Page 91

Know All Men by These Presents: That T. Ota
(k) of Waipahu, District of Ewa, City and County

of Honolulu, Territory of Hawaii, Grantor, for and in consideration of the sum of Two Thousand Two Hundred Fifty and No./100 Dollars (\$2,250.00) lawful money of the United States of America to him paid by Kaneichi Nii of Waipahu, aforesaid, Grantee, the receipt whereof is hereby acknowledged, does hereby give, grant, bargain, sell and convey unto the said Grantee, his heirs and assigns:

All of that certain piece or parcel of land situate, lying and being at Ohua, Waikele, Ewa, Oahu, T.H., being Lot "A" portion of R. P. 5694 L. C. Aw. 6545, Apana 1 to H. Haalilio, and a portion of Boundary Certificate No. 20 to John Hamauku, and described as follows:

Beginning at the Southeast corner of this piece of land on the West bank of the Kapakahi Stream, being also the Northwest end of present wooden bridge, the true azimuth and distance of the said point to a pipe driven at the Northwest corner of Lot 10, Land Court Application 779 being $339^{\circ} 06'$ 28.75 feet, and running by azimuths measured clockwise from true South:

1. $105^{\circ} 50'$ 170.00 feet along the North side of right of way;

2. $15^{\circ} 50'$ 14.80 feet along the West end of right of way;

3. $105^{\circ} 50'$ 105.80 feet along the remaining portion of R.P. 5694 L. C. Aw. 6545 Apana 1 to H. Haalilio, to a pipe;

4. $199^{\circ} 50'$ 140.10 feet along the same, to a pipe;

5. $294^{\circ} 16'$ 218.60 feet along the South bank of the Kapakahi Stream;

6. $311^{\circ} 48' 25.54$ feet along the West bank of the Kapakahi Stream;

7. $348^{\circ} 10' 61.30$ feet along the West bank of the Kapakahi Stream;

8. $19^{\circ} 14' 27.50$ feet along the West bank of the Kapakahi Stream, to the point of beginning and containing an area of 29,200 square feet, or 0.670 Acres, more or less.

Together with the additional right to use the right of way in common with the owners and occupants of this lot and the remaining portion of R.P. 5694 L. C. Aw. 6545 Apana 1 to H. Haalilio for a road purpose, which right of way is described as follows: [76]

Beginning at the Northeast corner of this piece of land on the West bank of the Kapakahi Stream, the true azimuth and distance to a pipe driven at the Northwest corner of Lot 10 of Land Court Application 779 being $339^{\circ} 06' 28.75$ feet, and running by azimuths measured clockwise from true South:

1. $339^{\circ} 06' 17.46$ feet along the West bank of the Kapakahi Stream;

2. $105^{\circ} 50' 181.04$ feet along the remaining portion of R. P. 5694 L. C. Aw. 6545 Apana 1 to H. Haalilio;

3. $195^{\circ} 50' 14.80$ feet along Lot "A";

4. $285^{\circ} 50' 170.00$ feet, to the point of beginning and containing the area of 2,598 square feet, more or less.

Together with all and singular the tenements, hereditaments and appurtenances, thereunto belonging or in any wise appertaining, and the reversion

and reversions, remainder and remainders, rents issues and profits thereof.

To Have and to Hold the same, together with all the rights, privileges, and appurtenances thereunto belonging, unto the said Grantee, his heirs and assigns, forever.

And the Said Grantor, for himself, his heirs and assigns hereby covenants with the said Grantee, his heirs and assigns that he is lawfully seized in fee simple of the granted premises; that he has good right to sell and convey the same as aforesaid; that the same are free and clear of all encumbrances, Save and Except the taxes for the year 1932, which is to be pro-rated; and that he will and his heirs and assigns shall Warrant and Defend the same unto the said Grantee, his heirs and assigns forever.

And for the consideration aforesaid, I, Yasu Ota, wife of the Grantor, do hereby remise, release and forever quitclaim unto the said Grantee, his heirs and assigns forever, all my right or possibility of dower in and to the afore-granted [77] premises.

In Witness Whereof, the said T. Ota and Yasu Ota, husband and wife, have hereunto set their hands and seals this 27th day of December, A. D. 1932.

(Seal) /s/ T. OTA

(Seal) /s/ YASU OTA.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 27th day of December, A. D. 1932, before me personally appeared T. Ota and Yasu Ota, hus-

band and wife, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

/s/ GIICHI MIWA,

Notary Public, First Judicial Circuit, Territory of Hawaii.

Entered of record this 27th day of December, A.D. 1932, at 2:22 o'clock p.m. and compared. Carl F. Wikander, Registrar of Conveyances. [78]

EXHIBIT No. 3

Know All Men by These Presents: That T. Ota (k) of Waipahu, District of Ewa, City and County of Honolulu, Territory of Hawaii, Grantor, for and in consideration of the sum of One Hundred and No/100 Dollars (\$100.00) lawful money of the United States of America to him paid by Kaneichi Nii of Waipahu, aforesaid, Grantee, the receipt whereof is hereby acknowledged, does hereby give, grant, bargain, sell and convey unto the said Grantee, his heirs and assigns:

All of that certain piece or parcel of land situate, lying and being at Ohua, Waikele, Ewa, Oahu, T. H., being portion of R. P. 5694 L. C. Aw. 6545, Apana 1 to H. Haalilio, and a portion of Boundary Certificate No. 20 to John Hamauku, and described as follows:

Beginning at the Northeast corner of this piece of land the true azimuth and distance of the said point of beginning from a pipe driven at the North-

west corner of Lot 10, Land Court Appl. 779, by traverses, being; (a) $159^{\circ} 06' 28.75$ feet and (b) $105^{\circ} 50' 30.0$ feet, and running by azimuths measured clockwise from true South:

1. $15^{\circ} 50' 14.8$ feet;

2. $105^{\circ} 50' 140.0$ feet;

3. $195^{\circ} 50' 14.8$ feet;

4. $285^{\circ} 50' 140.0$ feet to the point of beginning and containing an area of 2.072 square feet. Together with fifty per cent (50%) of additional undivided interest of right of way to use in common with the Owners and occupants of the above-mentioned lot and the remaining portion of L. C. Aw. 6545 Apana 1 to H. Haalilio for a road purpose only, which Right of Way is described as follows:

Beginning at the Northeast corner of this piece of land on the West bank of the Kapakahi Stream, the true azimuth and distance of the said point of beginning to a pipe driven at the Northwest corner of Lot 10 of Land Court Application 779 being $339^{\circ} 06' 28.75$ feet and running by azimuths measured clockwise from true South:

1. $339^{\circ} 06' 17.46$ feet along the West bank of the Kapakahi Stream;

2. $105^{\circ} 50' 41.04$ feet;

3. $195^{\circ} 50' 14.80$ feet;

4. $285^{\circ} 50' 30.00$ feet to the point of beginning and containing an area of 526 square feet.

Together with all and singular the tenements, hereditaments and appurtenances, thereunto belonging or in any wise appertaining, and the reversion

and reversions, remainder and remainders, rents issues and profits thereof.

To Have and to Hold the same, together with all the rights, privileges, and appurtenances thereunto belonging, unto the said Grantee, his heirs and assigns, forever.

And the Said Grantor, for himself, his heirs and assigns hereby covenants with the said Grantee, his heirs and assigns that he is lawfully seized in fee simple of the granted premises; that he has good right to sell and convey the same as aforesaid; that the same are free and clear of all encumbrances, Save and Except the taxes for the year 1938, which is to be pro-rated; and that he will and his heirs and assigns shall Warrant and Defend the same unto the said Grantee, his heirs and assigns forever.

And for the consideration aforesaid, Yasu Ota, wife of the Grantor, does hereby remise, release and forever quitclaim unto the said Grantee, his heirs and assigns forever, all of her right or possibility of dower in and to the aforegranted premises.

In Witness Whereof, the said T. Ota and Yasu Ota, husband and wife, have hereunto set their hands and seals this 23rd day of July, A. D. 1938.

(Seal) /s/ T. OTA

(Seal) /s/ YASU OTA. [81]

Territory of Hawaii,
City and County of Honolulu—ss.

On this 23rd day of July, A. D. 1938, before me personally appeared T. Ota and Yasu Ota, husband and wife, to me known to be the persons described

in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

(Seal) /s/ GIICHI MIWA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Entered of Record this 23rd day of July, A. D. 1938, at 9:35 o'clock a.m. and compared. Mark N. Huckestein, Registrar of Conveyances. [82]

[Printer's Note: Exhibit No. 4 is similar to Exhibit "A" attached to Complaint, and set out in full at page 13 of this printed Record.]

EXHIBIT No. 5

Liber 1503, Page 194.

POWER OF ATTORNEY

Know All Men by These Presents: That I, Saku Nii (w), formerly of Honolulu, City and County of Honolulu, Territory of Hawaii, and now residing in the Prefecture of Hiroshima, Empire of Japan, have made, constituted and appointed and by these presents do hereby make, constitute and appoint Shoso Nii, of Waipahu, said City and County of Honolulu, my true and lawful attorney, for me and in my name, place and stead, and for my use and benefit in said Territory of Hawaii, to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, rents, interests, dividends, annuities, choses in ac-

tion and demands whatsoever as are now or shall hereafter become due, owing, payable or belong to me; and have use and take all lawful ways and means in his or my name, or otherwise, for the recovery thereof, by attachment, arrest, distress, suits at law or in equity, or otherwise, with full power and authority to compromise and agree for the same, and give acquitances, receipts or other sufficient discharges for the same; for me and in my name to make, sign, seal, acknowledge, execute and deliver; to bargain, contract, agree for, purchase, receive and take,—lands, tenements and hereditaments, and accept the seizing and possession of all lands, tenements and hereditaments, and all deeds and other documents and assurances in the law therefor; and to lease, let, demise, bargain, sell, release, remise, convey, mortgage and hypothecate lands, tenements and hereditaments upon such terms and conditions, and under such covenants as he shall think fit, or to release and convey my right or possibility of dower in and to any and all real estate and leaseholds in which I may now have or may hereafter acquire such right or possibility of dower and to execute, acknowledge and deliver such releases or other instruments under seal or otherwise, which may be necessary or proper to effectuate such release or conveyance; also to bargain and agree for, buy, sell, [88] mortgage, vote, hypothecate, borrow, indorse, draw and in any and every way and manner deal in and with goods, wares, merchandise, choses in action, bonds, stocks, checks, moneys, certificates of deposit, notes, bills of exchange, chattels,

effects, furniture, animals, vehicles, tools, implements, and all other kinds of personal property in possession or in action, the particular enumeration above notwithstanding; and to make, do and transact all and every kind of business of whatever nature and kind soever; and also for me and in my name and as my act and deed, to sign, seal, execute, acknowledge and deliver such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bonds, notes, certificates of deposit, stocks and shares in corporations, receipts, proxies to vote at corporate meetings, checks, evidences of debt, releases and satisfaction of mortgages, judgments and other debts, and all other instruments in writing of whatever kind and nature as may be necessary or proper in the premises; with full power and authority to bring suits at law or in equity or otherwise for all or any property and /or/ property rights, whether real or personal belonging to me or which may hereafter belong to me or in which I may be or become interested or have or acquire title to, and with full power and authority to compromise and /or/ settle any such suits or actions upon such terms as he may think best; and also with full power and authority to defend all suits or actions brought against me or brought concerning any property or property right belonging to me or to hereafter belong to me or in which I may have an interest, and to accept and /or/ waive service of papers or process; with full power and authority to submit any matter in which I may be

interested or am interested in whether concerning real or personal property to arbitration upon such **terms and conditions** as he shall think best, and to agree to and abide by the decision of any such arbitrators and to take all steps necessary or proper to effectuate any such decisions or awards. [89]

Giving and Granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite necessary or proper to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, and hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof I have hereunto set my hand and seal this seventh day of February, A. D. 1939.

(Seal) Japanese Characters,
 (Saku Nii)

Executed in the presence of and witnessed by:

/s/ TSUTA KAWAMOTE.
American Consulate, Kobe. [90]

Certificate of Acknowledgment of Execution
of Document

Empire of Japan,
Prefecture of Hyogo, City of Kobe,
Consulate of the United States of America—ss:

I, Wm. C. Affeld, Jr., Vice Consul of the United States of America at Kobe, Japan, duly commis-

sioned and qualified, do hereby certify that on this 7th day of February, 1939, before me personally appeared Saku Nii to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the annexed instrument, and being informed by me of the contents of said instrument she duly acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year last above written.

(Seal) /s/ WM. C. AFFELD, JR.,
Vice Consul of the United
States of America.

Fee No. 33, Two Dollars.

Service No. 466. Fee \$2.00 United States gold, equal to Yen 7.48 local currency paid by affixing stamps to this document.

EXHIBIT No. 6

Liber 1503, Page 190.

POWER OF ATTORNEY

Know All Men by These Presents: That I, Kanei-chi Nii (k), formerly of Honolulu, City and County of Honolulu, Territory of Hawaii, and now residing in the Prefecture of Hiroshima, Empire of Japan, have made, constituted and appointed and by these presents do hereby make, constitute and appoint Shoso Nii, of Waipahu, said City and County of Honolulu, my true and lawful attorney, for me and in

my name, place and stead, and for my use and benefit in said Territory of Hawaii, to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, rents, interests, dividends, annuities, choses in action and demands whatsoever as are now or shall hereafter become due, owing, payable or belong to me; and have use and take all lawful ways and means in his or my name, or otherwise, for the recovery thereof, by attachment, arrest, distress, suits at law or in equity, or otherwise, with full power and authority to compromise and agree for the same, and give acquaintances, receipts or other sufficient discharge for the same; for me and in my name to make, sign, seal, acknowledge, execute and deliver; to bargain, contract, agree for purchase, receive and take,—lands, tenements and hereditaments, and accept the seizing and possession of all lands, tenements and hereditaments, and all deeds and other documents and assurances in the therefor; and to lease, let, demise, bargain, sell, release, remise, convey, mortgage and hypothecate lands, tenements and hereditaments upon such terms and conditions, and under such covenants as he shall think fit, or to consent to the conveyance by my wife of any and all real estate and leaseholds and to release and convey my right, title and interest, whether by way of courtesy or otherwise, in and to such real estate and leaseholds in which I may now have or hereafter acquire such right, title and interest therein and thereto and to execute, acknowledge and deliver such releases or other instruments under seal or

otherwise which may be necessary or proper to effectuate such release or conveyance; also to bargain and agree [92] for, buy, sell, mortgage, vote, hypothecate, borrow, indorse, draw and in any and every way and manner deal in and with goods, wares, merchandise, choses in action, bonds, stocks, checks, moneys, certificates of deposit, notes, bills of exchange, chattels, effects, furniture, animals, vehicles, tools, implements, and all other kinds of personal property in possession or in action, the particular enumeration above notwithstanding; and to make, do and transact all and every kind of business of whatever nature and kind soever; and also for me and in my name and as my act and deed, to sign, seal, execute, acknowledge and deliver such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bonds, notes, certificates of deposit, stocks and shares in corporations, receipts, proxies to vote at corporate meetings, checks, evidences of debt, releases and satisfaction of mortgages, judgments and other debts, and all other instruments in writing of whatever kind and nature as may be necessary or proper in the premises; with full power and authority to bring suits at law or in equity or otherwise for all or any property and /or/ property rights, whether real or personal belonging to me or which may hereafter belong to me or in which I may be or become interested or have or acquire title to, and with full power and authority to compromise and /or/ settle any such suits or actions upon such terms as he may

think best; and also with full power and authority to defend all suits or actions brought against me or brought concerning any property or property right belonging to me or to hereafter belong to me or in which I may have an interest, and to accept and /or/ waive service of papers or process: with full power and authority to submit any matter in which I may be interested or am interested in whether concerning real or personal property to arbitration upon such terms and conditions as he shall think best, and to agree to and abide by the decision of any such arbitrators and to take all steps necessary or proper to effectuate any such decisions or awards. [93]

Giving and Granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite necessary or proper to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, and hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof I have hereunto set my hand and seal this seventh day of February, A. D. 1939.

(Seal)

Japanese Characters
(Kaneichi Nii)

Executed in the presence of and witnessed by:

/s/ TSUTA KAWAMOTE,
American Consulate,
Kobe, Japan. [94]

Certificate of Acknowledgment of Execution
of Document

Empire of Japan,

Prefecture of Hyogo, City of Kobe,

Consulate of the United States of America—ss:

I, Wm. C. Affeld, Jr., Vice Consul of the United States of America at Kobe, Japan, duly commissioned and qualified, do hereby certify that on this 7th day of February, 1939, before me personally appeared Kaneichi Nii, to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the annexed instrument, and being informed by me of the contents of said instrument he duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year last above written.

(Seal) /s/ WM. C. AFFELD, JR.,
Vice Consul of the United
States of America.

Fee No. 33, Two Dollars.

Service No. 465. Fee \$2.00 United States gold, equal to Yen 7.48 local currency paid by affixing stamps to this document.

EXHIBIT No. 7

(Copy)

Honolulu,
Oahu—ss.

We hereby certify that we have carefully examined the Indexes in the Offices of the Clerks of the Supreme Court, Circuit Court of the First Judicial Circuit, Tax Assessor and Registrar of Conveyances, as to the title of Kaneichi Nii in and to:—
First: All of that certain parcel of land (portion of the land described in Royal Patent Number 5694, Land Commission Award Number 6545, Apana 1 to H. Haalilio and a portion of Boundary Certificate No. 20 to John Hamauku) situate, lying and being at Oahu, Waikele, in the District of Ewa, City and County of Honolulu, Territory of Hawaii, being Lot “A,” and thus bounded and described:—

Beginning at the Southeast corner of this piece of land on the West bank of the Kapakahi Stream, being also the Northwest end of present wooden bridge, the true azimuth and distance of the said point to a pipe driven at the Northwest corner [96] of Lot 10, Land Court Application 779 being $339^{\circ} 06' 28.75$ feet, and running by azimuths measured clockwise from true south:—

1. $105^{\circ} 50'$ 170.00 feet along the North side of right of way;
2. $15^{\circ} 50'$ 14.80 feet along the West side of right of way;
3. $105^{\circ} 50'$ 105.80 feet along the remaining portion of R.P. 5694 L.C. Aw. 6545 Apana 1 to H. Haalilio, to a pipe;

4. $199^{\circ} 50'$ 140.10 feet along the same, to a pipe;
5. $294^{\circ} 16'$ 218.60 feet along the South bank of the Kapakahi Stream;
6. $311^{\circ} 48'$ 25.54 feet along the West bank of the Kapakahi Stream;
7. $348^{\circ} 10'$ 61.30 feet along the West bank of the Kapakahi Stream;
8. $19^{\circ} 14'$ 27.50 feet along the West bank of the Kapakahi Stream to the point of beginning.

Containing an Area of 29,200 Square Feet, or 0.670 Acre, or thereabouts.

Together with the additional right to use the right of way in common with the owners and occupants of this lot and the remaining portion of R. P. 5694 L.C. Aw. 6545 Apana 1 to H. Haalilio for a road purpose, which right of way is described as follows:

Beginning at the Northeast corner of this piece of land on the West bank of Kapakahi Stream, the true azimuth and [97] distance to a pipe driven at the Northwest corner of Lot 10 of Land Court Application 779 being $339^{\circ} 06'$ 28.75 feet, and running by azimuths measured clockwise from true South:—

1. $339^{\circ} 06'$ 17.46 feet along the West bank of the Kapakahi Stream;
2. $105^{\circ} 50'$ 181.04 feet along the remaining portion of R.P. 5694 L.C. Aw. 6545 Apana 1 to H. Haalilio;
3. $195^{\circ} 50'$ 14.80 feet along Lot "A";
4. $285^{\circ} 50'$ 170.00 feet to the point of beginning.

Containing an Area of 2,598 Square Feet, or thereabouts.

Said above described premises having been con-

veyed to the said Kaneichi Nii by T. Ota (k), by Deed dated December 27th, A.D. 1932, and recorded in the Office of the Registrar of Conveyances at Honolulu in Liber 1189 on Pages 91-93 on December 27th, A.D. 1932, at 2:22 o'clock p.m.

Second: All of that certain parcel of land (portion of the land described in Royal Patent Number 5694, Land Commission Award Number 6545, Apana 1 to H. Haalilio and a portion of Boundary Certificate No. 20 to John Hamauku) situate, lying and being at Ohua, Waikele, in the District of Ewa, City and County of Honolulu, Territory of Hawaii, and thus bounded and described:

Beginning at the Northeast corner of this piece of [98] land the true azimuth and distance of the said point of beginning from a pipe driven at the Northwest corner of Lot 10, Land Court Appl. 779, by traverses, being: (a) $159^{\circ} 06' 28.75$ feet and (b) $105^{\circ} 50' 30.0$ feet, and running by azimuths measured clockwise from true South:

1. $15^{\circ} 50' 14.8$ feet;
2. $105^{\circ} 50' 140.0$ feet;
3. $195^{\circ} 50' 14.8$ feet;
4. $285^{\circ} 50' 140.0$ feet to the point of beginning.

Containing an Area of 2072 Square Feet, or thereabouts.

Together with fifty per cent (50%) of additional undivided interest of right of way to use in common with the owners and occupants of the above-mentioned lot and the remaining portion of L. C. Aw. 6545 Apana 1 to H. Haalilio for a road purpose only, which Right of Way is described as follows:

Beginning at the Northeast corner of this piece of land on the West bank of the Kapakahi Stream, the true tzimuth and distance of the said point of beginning to a pipe driven at the Northwest corner of Lot 10 of Land Court Application 779 being $339^{\circ} 06'$ 28.75 feet and running by azimuths measured clockwise from true South:

1. $339^{\circ} 06'$ 17.46 feet along the West bank of the Kapakahi Stream;
2. $105^{\circ} 50'$ 41.04 feet;
3. $195^{\circ} 50'$ 14.80 feet; [99]
4. $285^{\circ} 50'$ 30.00 feet to the point of beginning.

Containing an Area of 526 Square Feet, or thereabouts.

Said above described premises having been conveyed to the said Kaneichi Nii by T. Ota (k), by Deed dated July 23rd, A.D. 1938, and recorded in said Registry Office in Liber 1451 on Pages 418-420 on July 23rd, A.D. 1938, at 9:35 o'clock a.m.

(Note: Attention is called to the fact that the parcels of land hereinabove described as "Second" with respective areas of 2072 Square Feet and 526 Square Feet lie wholly, within and comprise the entire easement area described in "First" with an Area of 2598 Square Feet.)

And We further certify that there are no liens or encumbrances of whatsoever kind or nature against said title, save and except the following, to-wit:

TAXES

The Abstractors have been informed at the Office of [100] Tax Assessor that all taxes assessed against

the lands under search have been fully paid up to and including December 31st, A.D. 1947.

Taxes for the year 1948 are now a lien.

Key: Zone, 9; Section, 4; Plat, 14; Parcel, 9.

Area Assessed: 31,272 Sq. Ft. Assessed Valuations: Real Property, \$362.00; Improvements, \$1311.00; \$2173.00

And We further certify that the legal title to said parcel of land is vested in the said Kaneichi Nii, as shown by said Indexes, Subject, However, as Afore-said.

Kaneichi Nii (k) to Shoso Nii.

Power of Attorney: Dated: February 7th, A. D. 1939, Vol. 1503, Page 190. [101]

General Powers

(Recorded: February 27th, A.D. 1939 at 10:17 a.m.)

Saku Nii (w) to Shoso Nii.

Power of Attorney: Dated: February 7th, A.D. 1939, Vol. 1503, Page 194.

General Powers

(Recorded: February 27th, A.D. 1939, at 10:18 a.m.)

In Witness Whereof, We have hereunto set our hand this Thirty-first day of March, A.D. Nineteen Hundred Forty-Eight (1948) at 1:12 o'clock p.m.

MAKINNEY & COMPANY,

By /s/ KENNETH MAKINNEY,

[Endorsed]: Filed Aug. 24, 1948. [102]

[Title of District Court and Cause.]

City and County of Honolulu,
Territory of Hawaii—ss.

Albert K. Makinney, being duly sworn upon his oath, deposes and states:

1. That he is a duly licensed and empowered abstractor to make and prepare Certificates of Title under the provisions of Section 7501 of the Revised Laws of Hawaii, 1945, and that attached hereto and made a part of this affidavit is an abstract prepared by this affiant relating to certain real estate located in the District of Ewa, City and County of Honolulu, Territory of Hawaii.

/s/ ALBERT K. MAKINNEY.

Subscribed and sworn to before me this 30th day of August, 1948.

(Seal) /s/ JOSEPH K. ARAKI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires April 25, 1952.

Filed Aug. 30, 1948, at 2 o'clock and 15 minutes
p.m. Wm. F. Thompson, Jr., Clerk. [104]

Honolulu, Oahu—ss.

We hereby certify that we have carefully examined the Indexes in the Offices of the Clerks of the Supreme Court, Circuit Court of the First Judicial Circuit, Tax Assessor and Registrar of Conveyances, as to the title of the Attorney General of the United States,

in and to: All of that certain parcel of land (portion of the land described in Royal Patent Number 5694, Land Commission Award Number 6545, Apana 1 to H. Haalilio and a portion of Boundary Certificate No. 20 to John Hamauku) situate, lying and being at Ohua, Waikele, in the District of Ewa, City and County of Honolulu, Territory of Hawaii, being Lot "A", and thus bounded and described:

Parcel No. 1

Beginning at the Southeast corner of this piece of land on the West bank of the Kapakahi Stream, being also the Northwest end of present wooden bridge, the true azimuth and distance [105] of the said point to a pipe driven at the Northwest corner of Lot 10, Land Court Application 779 being $339^{\circ} 06' 28.75$ feet, and running by azimuths measured clockwise from true South:

1. $105^{\circ} 50' 170$ feet along the North side of right of way;
2. $15^{\circ} 50' 14.80$ feet along the West end of right of way;
3. $105^{\circ} 50' 105.80$ feet along the remaining portion of R.P. 5694 L.C. Aw. 6545 Apana 1 to H. Haalilio, to a pipe;
4. $199^{\circ} 50' 140.10$ feet along the same, to a pipe;
5. $294^{\circ} 16' 218.60$ feet along the South bank of the Kapakahi Stream;
6. $311^{\circ} 48' 25.54$ feet along the West bank of the Kapakahi Stream;
7. $348^{\circ} 10' 61.30$ feet along the West bank of the Kapakahi Stream;
8. $19^{\circ} 14' 27.50$ feet along the West bank of the Kapakahi Stream, to the point of beginning.

Containing an Area of 29,200 Square Feet, or 0.670 Acre, or thereabouts.

All of that certain parcel of land (portion of the land described in Royal Patent Number 5694, Land Commission Award Number 6545, Apana 1 to H. Haalilio and a portion of Boundary, Certificate No. 20 to John Hamauku) situate, lying and being at Ohua, Waikele, in the District of Ewa, City and County of Honolulu, Territory of Hawaii, and thus bounded and described: [106]

Parcel No. 2

Beginning at the Northeast corner of this piece of land the true azimuth and distance of the said point of beginning from a pipe driven at the Northwest corner of Lot 10, Land Court Appl. 779, by traverse, being: (a) $159^{\circ} 06' 28.75$ feet and (b) $105^{\circ} 50' 30.0$ feet, and running by azimuths measured clockwise from true South:

1. $15^{\circ} 50' 14.8$ feet;
2. $105^{\circ} 50' 140.0$ feet;
3. $195^{\circ} 50' 14.8$ feet;
4. $285^{\circ} 50' 140.0$ feet to the point of beginning.

Containing an Area of 2,072 Square Feet, or thereabouts.

Together with fifty per cent (50%) of additional undivided interest of right of way to use in common with the owners and occupants of the above-mentioned lot and the remaining portion of L.C. Aw. 6545 Apana 1 to H. Haalilio for a road purpose only, which Right of Way is described as follows:

Beginning at the Northeast corner of this piece of land on the West bank of the Kapakahi Stream, the true azimuth and distance of the said point of beginning to a pipe driven at the Northwest corner of

Lot 10 of Land Court Application 779 being $339^{\circ} 06'$ 28.75 feet and running by azimuths measured clockwise from true South:

1. $339^{\circ} 06'$ 17.46 feet along the West bank of the Kapakahi Stream; [107]
2. $105^{\circ} 50'$ 41.04 feet;
3. $195^{\circ} 50'$ 14.80 feet;
4. $285^{\circ} 50'$ 30.00 feet to the point of beginning and containing an area of 526 square feet.

Said above described premises having become vested in the Attorney General of the United States by Vesting Order dated September 12th, 1947, and recorded in the Office of the Registrar of Conveyances at Honolulu in Liber 2070 on Pages 61-64.

And we further certify that there are no liens or encumbrances of whatsoever kind or nature against said title, or proceedings of record affecting the same, save and except the following, to-wit:

In the United States District Court
For the Territory of Hawaii

Civil No. 837

SHOSO NII,

Plaintiff,

vs.

TOM C. CLARK, Attorney General as successor to
the Alien Property Custodian,

Defendant.

The following proceedings were had in the above entitled matter, to-wit:

1948

January 5—File Complaint of Shoso Nii. Prays

that the lands under search be returned to him as it was orally given to him by his father, Kaneichi Nii, etc.

February 27—File Stipulation and order Enlarging Time.

May 3—File Answer of Tom C. Clark.

May 6—File Answer of Shoso Nii to Counter Claim.

May 11—File Motion for Issuance of Commission To Take Deposition, Notice of Motion and Affidavit of Shiro Kashiwa.

May 13—File Order of Motion For Issuance of Commission To Take Deposition.

July 21—File Appearance of Leon R. Gross, counsel for Tom C. Clark.

July 21—File Stipulation and Order for Pre-Trial Examination of Shoso Nii, Plaintiff.

July 21—File Stipulation for Extension of Time For Filing Cross-Interrogatories On Behalf of Defendant Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian.

August 18—File Notice of Motion For Summary Judgment.

August 18—File Affidavit of Service. [109]

August 23—File Motion To Strike Affidavit of Leon R. Gross and Notice of Motion.

August 24—File Motion For Summary Judgment in favor of Defendant.

August 24—File Affidavit of Leon R. Gross In Support of Motion For Summary Judgment.

TAXES

The Abstractors have been informed at the Office of the Tax Assessor that all taxes assessed against

the lands under search have been fully paid, save and except the first installment for the year 1948, which is delinquent and unpaid and together with penalty and interest amounts to the sum of \$40.19. The second installment amounting to the sum of \$36.05 is now due and payable and unless sooner paid will be delinquent after November 20th, 1948.

Key—Zone: 9; Section: 4; Plat: 14; Parcel: 9.

Assessed Valuations—Area Assessed: 31,272 sq. ft.; Real Property: \$862.00; Improvements: \$1,311.00; \$2,173.00. [110]

The Abstractors have likewise been informed at the Office of the Tax Assessor that all taxes assessed against the parcel of land known as “Right of Way” with an area of 526 square feet have been fully paid, save and except the first installment for the year 1948, which is delinquent and unpaid and together with penalty and interest amounts to the sum of \$.09. The second installment amounting to the sum of \$.09 is now due and payable and unless sooner paid will be delinquent after November 20th, 1948.

Key—Zone: 9; Section: 4; Plat: 14; Parcel: 10.

Assessed Valuation: Real Property: \$5.00.

And we further certify that the legal title to said parcel of land is vested in the said Attorney General of the United States as shown by said Indexes, Subject, However, As Aforesaid, and Subject, Further, to the following condition contained in the aforesaid Vested Order date September 12th, 1947, recorded in said Registry Office in Liber 2070, Pages 61-64, to-wit: [111]

“All such property so vested to be held, used, administered, liquidated, sold or otherwise dealt with

in the interest of and for the benefit of the United States.”

And we further certify that we are duly licensed and empowered to make and prepare Certificates of Title under the provisions of Section 7501 of the Revised Laws of Hawaii, 1945.

In Witness Whereof, We have hereunto set our hand this Twenty-Seventh day of August, Nineteen Hundred Forty-Eight (1948) at 9:55 o'clock a.m.

MAKINNEY & COMPANY,
By /s/ ALBERT K. MAKINNEY.

[Endorsed]: Filed Aug. 30, 1948.

[Title of District Court and Cause.]

AFFIDAVIT OF MARK N. HUCKESTEIN

City and County of Honolulu,
Territory of Hawaii—ss.

Mark M. Huckestein, being duly sworn upon his oath deposes and states:

1. That he is the duly appointed, qualified, and present Registrar of Conveyances for the Territory of Hawaii; that he has in his possession and under his control the books and records which are and constitute part of the Bureau of Conveyances for the Territory of Hawaii:

2. Attached to and made a part of this affidavit are certified copies of documents which are recorded in the Bureau of Conveyances for the Territory of Hawaii at the book and page indicated on the certi-

fied copies of each of the documents which are attached to and made a part of this affidavit.

/s/ MARK M. HUCKESTEIN.

Subscribed and sworn to before me this 28th day of August, 1948.

(Seal) /s/ JOSEPH K. ARAKI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission expires April 25, 1952.

[Printer's Note: Exhibit No. 1 is similar to Exhibit No. 2, set out in full at page 53 of this printed Record.]

[Printer's Note: Exhibit No. 2 is similar to Exhibit No. 1 set out in full at page 51 of this printed Record.]

[Printer's Note: Exhibit No. 3 is similar to Exhibit No. 3 set out in full at page 57 of this printed Record.]

[Printer's Note: Exhibit No. 4 is similar to Exhibit No. 6 set out in full at page 64 of this printed Record.]

[Printer's Note: Exhibit No. 5 is similar to Exhibit No. 5 set out in full at page 60 of this printed Record.]

[Printer's Note: Exhibit No. 6 is similar to Exhibit "A" set out in full at page 13 of this printed Record.]

[Endorsed]: Filed Aug. 30, 1948. [115]

[Title of District Court and Cause.]

MOTION TO STRIKE AFFIDAVITS

Comes now Shoso Nii, Plaintiff above-named, by his attorney, Shiro Kashiwa, and moves to strike the following affidavits filed in the above-entitled cause:

1. The affidavit of Albert K. Makinney filed in the above-entitled court and cause on the 30th day of August, 1948, in that while the affidavit recites that the document attached thereto is an abstract prepared by the affiant, on the face of the document it is a bare certificate of title and not an abstract of title; that there is nothing to show that the affiant is qualified as an expert; and that the matters contained in the affidavit are not within the personal knowledge of the affiant, they being conclusions of law only and he is not competent himself to testify as to said facts.

2. The affidavit of Mark N. Huckestein in that the original affidavit of Leon R. Gross which was heretofore filed in this cause and which referred to the documents attached to the affidavit of Mark N. Huckestein was withdrawn, and since there is no affidavit in lieu of the affidavit submitted by Leon R. Gross and later withdrawn, said affidavit of Mark N. [150] Huckestein being purely for the purpose of certifying that the copies of the documents attached thereto are true copies. There is no purpose in filing the documents attached because Rule 56(e) of the Federal Rules of Civil Procedure requires the filing of sworn or certified copies of papers only where the papers are referred to in an affidavit. The main affidavit was withdrawn in this cause.

Dated at Honolulu, T. H., this 3rd day of September, A. D., 1948.

SHOSO NII,
Plaintiff,

By /s/ SHIRO KASHIWA,
His Attorney.

NOTICE OF MOTION

Please take notice that the foregoing Motion will be presented to the Honorable J. Frank McLaughlin at the hour of 10:00 o'clock a.m. on Wednesday, the 8th day of September, 1948, or as soon thereafter as counsel may be heard, in his Courtroom in the Federal Building, Honolulu, T. H.

Dated at Honolulu, T. H., this 3rd day of September, A. D., 1948.

SHOSO NII,
Plaintiff,

By /s/ SHIRO KASHIWA,
His Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 3, 1948. [151]

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF GENUINE-
NESS OF DOCUMENTS AND REQUEST
FOR ADMISSION OF FACTS PURSUANT
TO RULE 36 OF THE RULES OF CIVIL
PROCEDURE

To: Shoso Nii, Plaintiff, and Shiro Kashiwa, At-
torney for Shoso Nii, Plaintiff, 307 Hawaiian
Trust Building, Honolulu 48, Hawaii:

You and each of you are hereby requested, pur-
suant to Rule 36 of the Rules of Civil Procedure
for the District Courts of the United States, as
amended:

I.

To admit the genuineness of the following docu-
ments, photostatic copies of which have already been
furnished to you and which have heretofore been
filed as exhibits to the Affidavit of Mark N. Huckle-
stein, which Affidavit was filed in these proceedings
on August 30, 1948, to-wit:

1. That document purporting to be a Bill of Sale,
dated January 2, 1933, executed by Kaneichi Nii,
running to Shoso Nii, conveying, among other things
“that certain store in Waipahu, known as ‘K. Nii
Shoten’, together with all of the automobiles, furni-
tures, fixtures, goods, wares and merchandise, books
and accounts receivable, now being in and used in
that certain store, aforesaid”, which Bill of Sale
was recorded in Liber 1205, Page 26, in the Office
of the Registrar of Conveyances for the City and
County of Honolulu, Territory of Hawaii; [152]

2. That document purporting to be a Deed, dated December 27, 1932, executed by T. Ota and Yasu Ota, his wife, of Waipahu, District of Ewa, City and County of Honolulu, Territory of Hawaii, Grantor, running to Kaneichi Nii of Waipahu, as Grantee, dated December 27, 1932, and recorded December 27, 1932, in Liber 1189, Page 81, in the Bureau of Conveyances for the City and County of Honolulu, Territory of Hawaii;

3. That document purporting to be a Deed, dated July 23, 1938, executed by T. Ota and Yasu Ota, his wife, of Waipahu, District of Ewa, City and County of Honolulu, Territory of Hawaii, as Grantor, and running to Kaneichi Nii of Waipahu, as Grantee, recorded July 23, 1938, in Book 1451, Page 418, in the Office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii;

4. That certain Vesting Order, dated September 12, 1947, Number 9777, recorded in the Office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii, in Liber 2070, Page 61, on September 25, 1947, executed by the Attorney General of the United States as Successor to the Alien Property Custodian, under the authority of the Trading with the Enemy Act, as Amended, in and by which the Attorney General of the United States, as aforesaid, purported to vest certain parcels of real estate as the property of Kaneichi Nii, a resident and a national of Japan;

5. That document purporting to be a Power of Attorney, dated February 7, 1939, signed by Kaneichi Nii, "formerly of Honolulu, City and County of Honolulu, Territory of Hawaii, and now residing

in the Prefecture of Hiroshima, Empire of Japan'', running to Shoso Nii of Waipahu of the City and County of Honolulu, acknowledged on February 7, 1939, before William C. Affelt, Jr., Vice Consul of the United States of America, and recorded at Liber [153] 1503, Page 190, in the Office of the Registrar of Conveyances of the City and County of Honolulu, Territory of Hawaii;

6. That certain document purporting to be a Power of Attorney, dated February 7, 1939, executed by Saku Nii, "formerly of Honolulu, City and County of Honolulu, Territory of Hawaii, and now residing in the Prefecture of Hiroshima, Empire of Japan'', running to Shoso Nii of Waipahu, City and County of Honolulu, acknowledged before William C. Affelt, Jr., Vice Consul of the United States of America, and recorded in the Office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii, at Book 1503, Page 194.

TOM C. CLARK,
Attorney General as Successor to the Alien Property
Custodian, Defendant and Counter Claimant.

By RAY J. O'BRIEN,
United States Attorney,
EDWARD A. TOWSE,
Assistant U. S. Attorney,
LEON R. GROSS,
Attorney.

By /s/ LEON R. GROSS,
His Attorneys. [154]

To: Shoso Nii, Plaintiff, and Shiro Kashiwa, Attorney for Plaintiff:

II.

You and each of you are hereby requested, pursuant to Rule 36 of the Rules of Civil Procedure for the District Courts of the United States, as amended, to admit the truth of the following matters of fact, to-wit:

1. The facts that Kaneichi Nii, plaintiff's father, and a citizen of Japan, resided in Honolulu, Territory of Hawaii, for many years. In 1935, Kaneichi Nii returned to Japan and has resided in Japan until the present date. During his residence in Honolulu, Kaneichi Nii acquired certain property located at Waipahu, Oahu, Territory of Hawaii. The legal descriptions set forth in the documents described in paragraph I-2 and II-3 above, specifically describe this property and such property is the subject matter of this lawsuit.

2. The facts that under date of January 2, 1933, Kaneichi Nii executed a Bill of Sale in favor of his son, Shoso Nii, the plaintiff herein, for, "That certain store in Waipahu, aforesaid, known as 'K. Nii Shoten' together with all of the automobiles, furnitures, fixtures, goods, wares and merchandise, books and accounts receivable, now being in and used in that certain store aforesaid." Said Bill of Sale was recorded in Liber 1205, Page 26, of record, on May 26, 1933, in the Office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii. This was the same Bill of Sale referred to in paragraph I-1 above.

3. The facts that under date of December 27, 1932, Kaneichi Nii purchased from T. Ota and Yasu Ota,

his wife, a parcel of real estate located in Waipahu, Oahu, described in paragraph I-2 above, (which property is the subject matter of this lawsuit) and the property was conveyed by deed dated December 27, 1932, [155] from T. Ota and Yasu Ota, his wife, to Kaneichi Nii. The deed was recorded in the Office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii, in Liber 1189, Page 91, on December 27, 1932.

4. The facts that under date of July 23, 1938, T. Ota and Yasu Ota, his wife, conveyed by deed dated July 23, 1938, to Kaneichi Nii, plaintiff's father, a parcel of real estate located in Waipahu, Oahu, and said deed specifically describes certain real estate which is the subject matter of this lawsuit and said deed was recorded on July 23, 1938, in Liber 1451, Page 418, of the records of the Office of the Registrar of Conveyances for the City and County of Honolulu. Said deed is described in paragraph I-3 above.

5. The facts that by Vesting Order dated September 12, 1947, being Number 9777, the Attorney General of the United States as Successor to the Alien Property Custodian under the authority of the Trading with the Enemy Act, as Amended, vested the parcels of real estate referred to in paragraphs II-3 and II-4 above as property of Kaneichi Nii, a resident and a national of Japan. At the time that the Vesting Order was filed in the Office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii, record title to the said real estate was in Kaneichi Nii.

6. The facts that Shoso Nii, the plaintiff herein, and son of Kaneichi Nii, was born in Waipahu, Oahu, on January 3, 1914, and left the Hawaiian Islands

for Japan in July, 1941. Shoso Nii lived in Japan during all the intervening period from July, 1941, and returned to the Territory of Hawaii on November 8, 1947. On January 5, 1948, the plaintiff filed the instant suit under Section 9(a) of the Trading with the Enemy Act, as Amended, and alleged among other things: [156]

“That the plaintiff’s father is Kaneichi Nii; that said Kaneichi Nii is a citizen of Japan and has been continuously residing in Japan since May, 1935, to the date hereof; that prior to on or about May, 1935, said Kaneichi Nii resided for a long period of time at Waipahu aforesaid and operated a general merchandise store known as the ‘K. Nii Store’ at Waipahu, aforesaid; that due to his business ability, hard work and thrifty habits said Kaneichi Nii acquired considerable real property holdings in Waipahu aforesaid and accumulated a sizable estate for himself; that in May, 1935, said Kaneichi Nii decided to retire from active business and returned to Japan; that at the time he returned to Japan he left and gave by way of gift everything he left in the Territory of Hawaii to his only son, the plaintiff herein; and that the general merchandise store was turned over to the plaintiff by a duly executed bill of sale.”

7. The facts that in paragraph VII of the complaint filed in this lawsuit it is alleged:

“That with relation to the real property aforescribed in paragraph VI although it was orally given to the plaintiff, there was never a deed executed in favor of the plaintiff from his father.”

8. The facts that as of February 7, 1939, Kaneichi Nii and Saku Nii, his wife, father and mother respectively of Shoso Nii, the plaintiff herein, executed

before William C. Affelt, Jr., Vice Consul of the United States at Kobe, Japan, their respective powers of attorney running to Shoso Nii, the plaintiff, which powers of attorney are recorded in the Office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii, in Liber 1503, Pages 190 to 197, inclusive.

9. The facts that in the examination of the plaintiff, conducted on July 22, 1948, pursuant to Rule 26 of the Rules of Civil Procedure for the District Courts of the United States, the plaintiff Shoso Nii testified under oath as follows:

“Q. When you were over in Japan with your father from 1941 to 1947, did you at any time tell him that you had found out the title of this real estate was not in yourself? “A. No, sir. [157]

“Q. You did not? “A. No.

“Q. And why didn't you?

“A. Because I didn't find any necessity in the name being changed.”

TOM C. CLARK,
Attorney General as Successor to the Alien Property
Custodian, Defendant and Counter Claimant.

By RAY J. O'BRIEN,
United States Attorney,
EDWARD A. TOWSE,
Assistant U. S. Attorney,
LEON R. GROSS,
Attorney,

By /s/ LEON R. GROSS,
His Attorneys.

[Endorsed]: Filed Sept. 9, 1948. [158]

[Title of District Court and Cause.]

AFFIDAVIT OF T. OTA

City and County of Honolulu,
Territory of Hawaii—ss.

T. Ota, of Waipahu, District of Ewa, City and County of Honolulu, Territory of Hawaii, being duly sworn, upon his oath deposes and says:

1. He has examined the original deed dated December 27, 1932, signed by T. Ota and Yasu Ota, his wife, and recorded in the office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii, on December 27, 1932, in Liber 1189, pages 91-93, inclusive, and the said deed bears the original signature of himself and his wife, and is the deed by which this affiant conveyed to Kaneichi Nii certain real estate located at Ohua, Waikele, Ewa, Oahu, T. H., and this said deed was made, executed, and delivered by this affiant and his wife for a good and valuable consideration for the purpose of conveying to Kaneichi Nii, of Waipahu, Oahu, T. H., grantee named in said deed, certain real estate which this affiant sold to the aforesaid Kaneichi Nii in the year 1932 at or about the time that the deed was dated. [161]

2. Affiant further states that he has personally examined the original deed dated July 23, 1938, executed by this affiant and Yasu Ota, his wife, and that the deed is the same deed which this affiant and his wife made, executed, and delivered to Shoso Nii at or about the date the deed bears.

This deed has been recorded in the office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii, in Liber 1451, pages 418-420, inclusive.

3. At the time that this affiant made, executed and delivered the deed described in Paragraph 2 of this affidavit, he requested Mr. Shoso Nii to state whose name should appear in said deed, and Mr. Shoso Nii stated that title to the big piece of property was in his father, Kaneichi Nii, and he desired that the deed dated July 23, 1938, be made in the name of Kaneichi Nii, and accordingly, this affiant caused said Kaneichi Nii to be named in the deed dated July 23, 1938.

/s/ T. OTA.

Subscribed and sworn to before me this 9th day of September, 1948.

(Seal) /s/ JOSEPH K. ARAKI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires April 25, 1952.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 10, 1948. [162]

[Title of District Court and Cause.]

ADMISSION OF FACTS AND OF
GENUINENESS OF DOCUMENTS

To: Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, Defendant, and Ray J. O'Brien, United States Attorney; Edward A. Towse, Assistant United States Attorney, and Leon R. Gross, Attorney, Attorneys for Defendant.

Comes now Shoso Nii, Plaintiff above named, and in response to the Request for Admission of Genuineness of Documents and Request for Admission of Facts, filed pursuant to Rule 36 of the Rules of Civil Procedure, by the Defendant above named, states as follows:

I. That he admits:

1. That the photostatic copies of the documents listed in Paragraphs I-1, I-2, I-3, I-4, I-5 and I-6 on Pages 1 to 3 of the Notice to Admit filed by the Defendant are true and correct copies of the original and the original of the said documents are genuine.

2. That the facts requested to be admitted in Paragraphs II-1 are true, except that portion of the said paragraph [164] which refers in substance to paragraph I-3 (mistakenly referred to in said paragraph II-1 as II-3), and that with relation to said property Plaintiff denies that it was acquired while said Kaneichi Nii resided in Honolulu in that on July 23, 1938, Kaneichi Nii was not residing in the Territory of Hawaii.

3. All of the facts requested to be admitted in paragraphs II-2, II-3, II-4, II-5, II-6, II-7, II-8 and II-9.

Dated at Honolulu, T. H., this 11th day of September, A.D. 1948.

/s/ SHOSO NII,
Plaintiff.

Territory of Hawaii,
City and County of Honolulu—ss.

Shoso Nii, being first duly sworn, on oath deposes and says: That he is the Plaintiff above named; that he has read the foregoing Admission of Facts and of Genuineness of Documents, knows the contents thereof and that the same are true to the best of his knowledge, information and belief.

/s/ SHOSO NII.

Subscribed and sworn to before me this 11th day of September, A.D. 1948.

(Seal) /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires August 9, 1951.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 13, 1948. [165]

[Title of District Court and Cause.]

COUNTER AFFIDAVIT OF SHOSO NII IN
ANSWER OF AFFIDAVIT OF T. OTA
FILED IN SUPPORT OF THE MOTION
OF TOM C. CLARK FOR SUMMARY
JUDGMENT

Territory of Hawaii,
City and County of Honolulu—ss.

Shoso Nii, being first duly sworn, on oath deposes and says: That he has examined the affidavit of T. Ota filed in the above-entitled court and cause in support of the Motion of Tom C. Clark for summary judgment, and in answer to said affidavit states that the affiant at no time in Japanese or English told Mr. T. Ota that "title to the big piece of property was in his father, Kaneichi Nii"; that the conversation was all in Japanese and the Japanese equivalent of the word "title" was never used in the said conversation, but the affiant stated in Japanese to said T. Ota on or about July 23, 1938, that because the large piece was still under affiant's father's name, to make the deed [167] in affiant's father's name and that at a later time affiant will change it all to affiant's name because they were all affiant's;

That affiant further states that the affiant's father is Kaneichi Nii; that said Kaneichi Nii is a citizen of Japan and has been continuously residing in Japan since May, 1935, to the date hereof; that prior to May, 1935, said Kaneichi Nii resided for a long period of time at Waipahu afore-

said and operated a general merchandise store known as the "K. Nii Store" at Waipahu aforesaid; that due to affiant's father's business ability, hard work and thrifty habits said Kaneichi Nii acquired considerable real property holdings in Waipahu aforesaid and accumulated a sizeable estate for himself, both here in Hawaii as well as in Japan; that by 1935 he had enough investments in Japan to take care of himself for the rest of his life; that affiant was said Kaneichi Nii's only son; that it is a Japanese custom for a Japanese father to leave all of his properties to his eldest son; that said Kaneichi Nii left for Japan in May, 1935, and he then left everything he had in Hawaii to his son, Shoso Nii, the affiant; that at the time affiant received by way of gift from his father the larger parcel of land described in paragraph 4 of plaintiff's complaint; that there was never a deed executed in favor of the affiant from his father because at the time of leaving he left suddenly because of his daughter's illness in Japan; that subsequent to May, 1935, for more than 10 continuous years the affiant took possession of the premises and openly, exclusively, adversely, continuously and without interruption held himself to be the owner of the said parcel against the entire world; that since May, 1935, he possessed said property and collected all rentals due from the premises and kept the said rental for his own use; that since May, 1935, he paid all Territorial real property taxes on the property; that since May, 1935, he considerably improved the premises with perma-

ment [168] improvements at his own labor and large expense; that since May, 1935, he controlled said property in every respect as if he owned the property; that since May, 1935, he paid in his own name gross income taxes to the Territory of Hawaii on gross rentals from the premises; that since May, 1935, he paid in his own name net income taxes, both Territorial and Federal, on the net rental income from the premises; that in July, 1938, he purchased a small parcel of land adjacent to the large parcel so that the means of entry to the large parcel may be improved; that all of the foregoing acts were in reliance of the gift of the larger parcel in 1935; that the smaller right of way parcel purchased in July, 1938, is described in paragraph 7 of the plaintiff's complaint; that although the record title of the property remained in Kaneichi Nii, the plaintiff was, since May, 1935, the true and beneficial owner of the said parcel; that even by way of adverse possession affiant was, up to the time of taking by the Vesting Order, the owner of the said parcel.

/s/ SHOSO NII.

Subscribed and sworn to before me this 13th day of September, A.D. 1948.

[Seal] /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires August 9, 1951.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 14, 1948. [169]

In the United States District Court for the
Territory of Hawaii

Civil No. 837

SHOSO NII,

Plaintiff,

vs.

TOM C. CLARK, Attorney General as Successor
to the Alien Property Custodian,

Defendant.

TOM C. CLARK, Attorney General, as Successor
to the Alien Property Custodian,

Counter-Plaintiff,

vs.

SHOSO NII,

Counter-Defendant.

PETITION

Now comes Tom C. Clark, Attorney General of the United States, as Successor to the Alien Property Custodian, Counter-Plaintiff, by Ray J. O'Brien, United States Attorney for the District of Hawaii, and respectfully represents unto this Honorable Court the following:

1. The original complaint in these proceedings was filed on January 5, 1948, and the jurisdiction of this Court was invoked under Section 9 (a) of the Trading with the Enemy Act, as Amended.

2. The answer of this counter-plaintiff was filed

on May 3, 1948, in these proceedings. Said answer alleges in Paragraphs 19, 20 and 21 for a counter-claim against the counter-defendant, Shoso Nii, the following: [171]

“That the Court has jurisdiction of this counter-claim under Section 24 (1) of the Judicial Code (28 USC Sec. 41 (1)) and Section 17 of the Trading with the Enemy Act, as amended (50 U.S.C., App., Sec. 17).

“That by virtue of Vesting Order No. 9777, dated September 12, 1947, a copy of which is incorporated in the plaintiff's Complaint as Exhibit “A” thereto, the defendant became and is the owner of:

“ ‘That certain debt or other obligation owing to Kaneichi Nii, also known as Konichi Nii, by Shoso Nii, doing business as S. Nii Store, arising out of rents collected from the property described in subparagraph 2-a hereof, and any and all rights to demand, enforce and collect the same.’ ”

3. A copy of the original Vesting Order referred to in the counter-claim is attached to and made a part of the complaint originally filed herein as Exhibit “A” and said Vesting Order is hereby incorporated herein by reference.

4. On August 30, 1948, a Turnover Directive was served upon Shoso Nii directing the said Shoso Nii to turn over to the office of Alien Property, Department of Justice, Territory of Hawaii, the sum of Three Thousand One Hundred Sixty-nine Dollars and One Cent (\$3,169.01) for property that was

vested by Vesting Order 9777. A copy of the Turnover Directive is attached hereto and made a part of this Petition as Exhibit "B."

5. The Counter-Defendant, Shoso Nii, stood and now stands in defiance of Vesting Order 9777 and the Turnover Directive hereinabove referred to. Said Shoso Nii has failed and refused to turn over to the Office of Alien Property, or to anyone duly authorized in its behalf, the sum of Three Thousand One Hundred Sixty-Nine Dollars and One Cent (\$3,169.01) vested by Vesting Order 9777 or any other sum or sums whatsoever, in violation of the provisions of the Trading with the Enemy Act, as amended.

6. The Counter-Defendant, **Shoso Nii**, has failed and refused and now persists in such failure and refusal to comply with the above-described Vesting Order and Turnover Directive [172] ordering the Counter-Defendant to deliver to the Counter-Plaintiff the sum of Three Thousand One Hundred Sixty-Nine Dollars and One Cent (\$3,169.01).

7. No previous application has been made for the relief herein requested.

8. Wherefore, Tom C. Clark, Attorney General of the United States, as Successor to the Alien Property Custodian, Counter-Plaintiff, prays that an Order issue directing Shoso Nii to show cause, if any he have, at a time and place to be determined by this Honorable Court, why Shoso Nii

should not comply forthwith with the aforesaid Vesting Order and Turnover Directive.

/s/ RAY J. O'BRIEN,

United States Attorney, District of Hawaii.

/s/ EDWARD A. TOWSE, OB

Assistant U. S. Attorney, District of Hawaii.

/s/ LEON R. GROSS,

Attorney.

Attorneys for Tom C. Clark, Attorney General,
United States, as Successor to the Alien Property Custodian. [173]

EXHIBIT "B"

Office of Alien Property

Department of Justice

TURNOVER DIRECTIVE

Re: Property of Kaneichi Nii, also known as Kenichi Nii, Vesting Order 9777 (12 F. R. 6317, September 20, 1947)

To Shozo Nii, P.O. Box 416, Waipahu, Oahu, T. H.

Under the authority of the Trading with the Enemy Act, as amended, Executive Order 9193, as amended, Executive Order 9788 and pursuant to law, the following described property having been vested in the Attorney General of the United States by Vesting Order 9777, dated September 12, 1947 (a copy of which is attached hereto and by reference made a part hereof):

"a. Real property situated at Waikele, Waipahu, Oahu, T. H., particularly described in Ex-

hibit A, attached hereto and by reference made a part hereof, together with all hereditaments, fixtures, improvements and appurtenances, thereto, and any and all claims for rents, refunds, benefits or other payments arising from the ownership of such property, and

“b. That certain debt or other obligation owing to Kaneichi Nii, also known as Kenichi Nii by Shozo Nii, doing business as S. Nii Store, arising out of rents collected from the property described in subparagraph [a] hereof, and any and all rights to demand, enforce and collect the same,”;

Now, Therefore, by virtue of the authority above set forth,

It Is Hereby Found that the sum of \$3,169.01 is property that was vested by Vesting Order 9777, which is now in your possession or under your control; and

It Is Hereby Required that the property above described, i.e., the sum of \$3,169.01, shall forthwith be turned over by you to the Attorney General of the United States to be held, used, administered or otherwise dealt with in the interest of and for the benefit of the United States. [174]

Your attention is invited to Section 5(b) of the Trading with the Enemy Act, as amended, which provides that

“Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued

hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same, and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

Executed at Washington, D. C., on August 20, 1948.

For the Attorney General:

/s/ DAVID L. BAZELON,
Assistant Attorney General, Director, Office of
Alien Property.

[Sealed.]

[Endorsed]: Filed Oct. 26, 1948. [175]

[Title of District Court and Cause.]

AMENDED ORDER AND RULE TO SHOW CAUSE

And now on this 28th day of October, A.D. 1948, this cause having come on to be heard upon the Petition and the Exhibits annexed thereto of Tom C. Clark, Attorney General of the United States, as Successor to the Alien Property Custodian, by his attorney, Ray J. O'Brien, United States Attorney for the District of Hawaii, good cause appearing therefor; the Court having jurisdiction of

the parties and of the subject matter, and being fully advised in the premises:

It is hereby ordered that Shoso Nii, Counter-Defendant and Respondent herein, show cause, if any he have, on Tuesday, November 9, 1948, at the hour of 1:30 p.m., or as [177] soon thereafter as counsel may be heard before the undersigned, J. Frank McLaughlin, a Judge of the United States District Court for the Territory of Hawaii, in the room usually occupied by him as a court room in the Federal Building, Honolulu, T. H., why an Order should not be made and entered by the undersigned Judge of the United States District Court for the Territory of Hawaii, directing the said Shoso Nii then and there to comply forthwith with Vesting Order 9777 issued by the Office of Alien Property, Department of Justice, and to comply further with the Turnover Directive, dated August 20, 1948, issued pursuant to Vesting Order 9777, and for such other and further relief as the Court may deem just, together with the costs and disbursements of the various proceedings herein.

It Is Further Ordered that a copy of this Order to Show Cause and a copy of the Petition pursuant to which this Order was issued be served personally upon said Shoso Nii on or before November 3, 1948, and the Return of the United States Marshal for the Territory of Hawaii, evidencing service upon said Shoso Nii as indicated, shall be deemed sufficient notice, according to law.

It Is Further Ordered that, in the event of the failure or refusal of said Shoso Nii to comply with

the terms and conditions of this Order, and to comply further with such Order or Orders as may be entered on the return day of the Rule to Show Cause entered herein, that said Shoso Nii be punished as provided by law.

/s/ J. FRANK McLAUGHLIN,
Judge, United States District Court for the Territory of Hawaii. [178]

[Endorsed]: Filed Oct. 28, 1948. [179]

UNITED STATES MARSHAL'S RETURN

The within Amended Order and Rule to Show Cause was received by me on the 28th day of October, A.D. 1948, and the same is returned duly executed as follows:

Service was made by me personally on November 2nd, 1948, upon Shoso Nii at Kanichi Nii Store, Waipahu, Oahu, T. H., at 10:40 a.m., by handing to and leaving with him a certified copy of the original Amended Order and Rule to Show Cause.

Dated at Honolulu, T. H., this 2nd day of November, A.D. 1948.

OTTO F. HEINE,
U. S. Marshal, District of
Hawaii.

By /s/ EMMANUEL U. MOSES, JR.,
Deputy.

[Endorsed]: Filed Nov. 4, 1948.

[Title of District Court and Cause.]

ANSWER TO PETITION OF ATTORNEY
GENERAL UNDER SECTION 17

Comes now Shoso Nii, Plaintiff above named, by his attorney, Shiro Kashiwa, and in answer to the petition of the Attorney General of the United States for the entry of order directing Shosi Nii to turn over forthwith the property vested under Vesting Order 9777, states as follows:

I.

"That he admits the allegations of the Attorney General contained in Paragraphs I, II, III, IV and VII.

II.

That in answer to the allegations of the Attorney General contained in Paragraphs V, VI and VIII, he refers to the answer against the counter-claim of the Attorney General filed in the above-entitled cause and hereby incorporates every allegation in the answer to the counter-claim heretofore filed in this cause; that he is not indebted in any way in any sum to the Alien Property Custodian; that prior to the issuance of the Vesting Order he was not in any way indebted to Kaneichi Nii; that he has never admitted any indebtedness to Kaneichi Nii; and [181] that he never authorized any person to admit any indebtedness to the Alien Property Custodian.

Wherefore Plaintiff prays that the petition of

the Attorney General under Section 17 of Trading with the Enemy Act be forthwith dismissed.

Dated at Honolulu, T. H., this 8th day of November, A.D. 1948.

SHOSO NII,
Plaintiff.

By /s/ SHIRO KASHIWA,
His Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 8, 1948. [182]

[Title of District Court and Cause.]

ORAL DECISION ON THE PETITION OF
THE ATTORNEY GENERAL OF THE
UNITED STATES FOR THE ENTRY OF
AN ORDER UNDER SECTION 17 OF THE
TRADING WITH THE ENEMY ACT, AS
AMENDED, DIRECTING SHOSO NII TO
TURN OVER FORTHWITH THE PROP-
ERTY VESTED UNDER VESTING ORDER
No. 9777

“The Court: Well, I can go around and around in circles on this thing for a long time. I thought the vesting order was as you had construed it in argument, but I find on closer examination of it that I had not been reading it as carefully as I should have. I thought by virtue of the position of the commas in 2(B) that Shoso Nii was an alias for Kaneichi Nii, one and the same person. I

find now that that comma was misplaced by virtue of a typographical error. I do agree that the thing should be construed as a whole. But I cannot by so doing reach the same conclusion that you do out of 2(A). That relates to, after seizing all the real estate, a claim for rents. But this is not a claim for rent. This is with respect to a debt described specifically in 2(B), and certainly a specific description will obtain over the general. I deem it, therefore, to be squarely the type of situation that is raised by the court in this Manufacturers Trust Company case, *Tom C. Clark vs. Manufacturers Trust Company*, Second Circuit Court, which you have so kindly presented to me this afternoon, decided August 5, 1948. In other words, to repeat, the language in that decision reads as follows:

“This appeal presents several interesting questions upon which there is surprisingly little direct authority. A suit under § 17 of the Act is a summary proceeding to compel delivery of possession of enemy-owned property which has been effectively seized by a valid vesting order. The appellant concedes, as it must, that a debtor must pay to the Custodian an acknowledged debt regardless of any controversy as to who is the creditor.’ (citing cases) ‘This imposes no hardship, since the debtor is protected by § 7(e) from pursuit by any other person. But when the existence of the debt is denied, the appellant contends that requiring it to be paid before judicial determination of the dispute, in effect permits the Custodian to create the debt by his *ex parte* determination and to seize property of the

putative debtor which is not owed to the enemy or to anyone else. The consequences of giving the Custodian such a power are exceedingly drastic; the alleged debtor may have to sell property in order to obtain the money necessary to make the payment, and the loss so sustained is not remediable by a suit under § 9 for its return.'

"Then skipping a paragraph

'If the putative debtor denies the existence of any debt whatever, we should hesitate to hold that the Custodian's power extends so far as to make his ex parte determination that there is a debt and the amount of it conclusive in a proceeding under § 17. To so hold would mean that the Custodian can by his own ex parte action call property into existence for purposes of seizure. But the question in that bald form is not before us for decision.'

"I deem it to be before me for decision, and I decide that my answer to it is that the Custodian can not. I recognize that there are no square, clear-cut authorities on the point. I realize also that we are some distance now from the conflict. Perhaps it is just as well. But in most instances I am unalterably opposed to the exercises of drastic power unless there is abundant [184] clear evidence to support it, which I do not find to exist here. I think the ends of justice can be as well served by the turnover directive being settled at the end of the litigation."

Mr. Gross: What is the order of the Court?

The Court: The petition is denied.

Mr. Gross: You mean the rule is discharged?

The Court: That's right.

I will not enforce the turn-over directive.

Mr. Gross: Do you intend to enter any further order other than the decision that you have made, now?

The Court: No.

Mr. Gross: I take exception to the ruling of the court for the purpose of the record.

The Court: Very well.

Approved:

/s/ J. FRANK McLAUGHLIN,
Judge of the United States Court for the Territory
of Hawaii.

November 19, 1948.

[Endorsed]: Filed Nov. 19, 1948. [185]

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT

Comes now Shoso Nii, Plaintiff above named, by his attorney, Shiro Kashiwa, and under Rule 15 of the Rules of Civil Procedure, hereby moves that plaintiff be permitted and leave be granted by this Court to file the amended complaint which is attached hereto and made a part of this motion in the above-entitled cause on the following grounds:

1. That the amended complaint will be more in conformance with the proof to be presented in this cause;

2. That the issues and facts to be presented are matters which happened twenty or more years ago and when the evidence to be presented at the trial of this cause was carefully reviewed it appeared and it now appears that an amended complaint should be filed;

3. That the amendment if permitted will be meritorious;

4. That plaintiff has sufficient evidence to support the amended complaint;

5. That plaintiff will suffer great injustice if the amendment is not permitted;

6. That the amendment does not change the cause of action alleged in the original complaint;

7. That this motion is based on the affidavit of Shiro Kashiwa, attorney for the plaintiff, attached hereto and on the records of this cause;

8. That plaintiff is willing to permit the defendant ample time to answer the amended complaint, leaving the determination of said time to this Court.

Dated at Honolulu, T. H., this 29th day of November, A.D. 1948.

SHOSO NII,
Plaintiff.

By /s/ SHIRO KASHIWA,
His Attorney. [188]

AFFIDAVIT

Territory of Hawaii,
City and County of Honolulu—ss.

Shiro Kashiwa, being first duly sworn, on oath deposes and says:

That he is the attorney of record of the plaintiff in the above-entitled cause and court; that he has carefully weighed the evidence in the cause; that the cause is a difficult one in that principles in equity not commonly dealt with must be resorted to; that the attached complaint will be more in conformance with the proof to be presented in this cause; that material facts and evidence relating to matters which happened twenty or more years ago will be presented in the cause; that when affiant first interviewed his plaintiff all facts material to the cause were not revealed to the affiant; that upon a more thorough examination of the facts before the trial date new facts not heretofore called to the attention of the affiant were disclosed to the affiant; that affiant believes that the amendment will permit a presentation of evidence more in conformance with the facts [189] of the cause; that affiant diligently worked on the original complaint when it was first filed; that plaintiff has only an eighth grade education and it has been exceedingly difficult for the affiant to get the facts of the case out of him; that affiant believes that justice will be better carried out if the amended complaint is allowed to be filed; that the amended complaint deals and covers the same subject matter as in the

original complaint and the amended complaint does not state a new cause of action; that the cause of action is the same as that alleged in the original complaint; that affiant makes this affidavit in support of the motion attached hereto.

Dated at Honolulu, T. H., this 29th day of November, A.D. 1948.

/s/ SHIRO KASHIWA.

Subscribed and sworn to before me this 29th day of November, 1948.

[Seal] /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires: August 9, 1951.

[Endorsed]: Filed Nov. 29, 1948. [190]

[Title of District Court and Cause.]

AMENDED COMPLAINT

To the Honorable the Judges of the United States
District Court for the Territory of Hawaii:

Comes now Shoso Nii, plaintiff above named, and
alleges as follows:

I.

That the ground upon which the jurisdiction of
this Court is involved and depends is as follows:

This is an action against the Attorney General as
successor to the Alien Property Custodian involving
the return of a parcel of real property valued in
excess of \$30,000.00 brought under the Trading with

the Enemy Act, as amended, 50 U. S. C. A. Sec. 9 (a) and also for ancillary equitable relief arising out of the same matter in conjunction therewith.

II.

That the plaintiff, Shoso Nii, was for more than 33 years next preceding the date hereof and is a permanent resident of Waipahu, Oahu, City and County of Honolulu, Territory of Hawaii, United States of America; and that the [192] plaintiff is not an "enemy" or an "ally of enemy" as the terms are defined in the Trading with the Enemy Act.

III.

That the plaintiff was born at Waipahu aforesaid on the 3rd day of January, 1914, and by virtue of his birth within the jurisdiction of the United States of America is a citizen of the United States; and that he has continuously since the date of his birth to the date hereof kept and maintained his status as a citizen of the United States of America.

IV.

That the defendant, Tom C. Clark, was, at the time of the issuance of the Vesting Order herein-after mentioned, and is now the Attorney General of the United States of America, the duly appointed successor to the Alien Property Custodian acting and purporting to act pursuant to the authority vested in him by the Trading with the Enemy Act as amended and Executive Order No. 9095 as amended.

V.

That the plaintiff's father is Kaneichi Nii; that

plaintiff was and is the only son of said Kaneichi Nii; that said Kaneichi Nii is a citizen of Japan and has been continuously residing in Japan since May, 1935, to the date hereof; that prior to on or about May, 1935, said Kaneichi Nii resided for a long period of time at Waipahu aforesaid and operated a general merchandise store known as the "K. Nii Store" at Waipahu aforesaid; that due to his business ability, hard work and thrifty habits said Kaneichi Nii acquired considerable real property holdings in Waipahu aforesaid and accumulated a sizeable estate for himself; [193] that on or about the year 1928 the plaintiff graduated from the 8th grade of the Waipahu Elementary School; that up to the said year plaintiff lived continuously with his father; that at the time of graduation plaintiff desired to go to high school and then to college; that in spite of plaintiff's expression of his desire to continue his studies said Kaneichi Nii persuaded plaintiff not to continue his studies but to become a merchant and help in aforesaid "K. Nii Store"; that in consideration of plaintiff's giving up his studies said Kaneichi Nii agreed, covenanted and promised that said Kaneichi Nii will give and transfer all of the properties, both real and personal, he owned in the Territory of Hawaii to the plaintiff in case said Kaneichi Nii left for Japan or in case said Kaneichi Nii died all of said Kaneichi Nii's properties will be the plaintiff's; that plaintiff relying on said Kaneichi Nii's aforementioned promise, covenant and agreement did not continue on to high school but discontinued, quit and dropped his schooling com-

pletely and in July, 1928, began helping said Kaneichi Nii at the said "K. Nii Store"; that plaintiff received no compensation whatsoever by way of wages or salary; that he worked and helped from 6:00 a.m. each morning to 11:00 p.m. each night helping at the said "K. Nii Store," every day including Sundays, continuously between said July, 1928, to January 2nd, 1933; that on January 2nd, 1933, said Kaneichi Nii by a properly executed written instrument, a bill of sale, transferred the said "K. Nii Store" to the plaintiff; that on or about said January 2nd, 1933, said Kaneichi Nii had already made plans to retire from his business and return to Japan; that on or about December 17, 1932, in accordance with the agreement, [194] promise and covenant aforementioned made, executed and delivered to the plaintiff a will in accordance with the laws of the Territory of Hawaii, giving, devising and bequeathing all of his personal and real properties of which said Kaneichi Nii may die seized or possessed unto the plaintiff absolutely; that by said 1933 said Kaneichi Nii had amassed in Japan a considerable estate in real property holdings as well as savings and could have lived for the rest of his life without any further labor;

VI.

That during the early part of the year 1932 said Kaneichi Nii out of the funds of the "K. Nii Store" purchased two parcels of improved and unimproved real property in Waipahu aforementioned by way of agreements of sale; that the following improved property was one of the parcels:

All of that certain parcel of land (portion of the land described in Royal Patent Number 5694, Land Commission Award Number 6545, Apana 1 to H. Haalilio and a portion of Boundary Certificate No. 20 to John Hamauku) situate, lying and being at Ohua, Waikele, in the District of Ewa, City and County of Honolulu, Territory of Hawaii, being Lot "4," and thus bounded and described:

Parcel No. 1

Beginning at the Southeast corner of this piece of land on the West bank of the Kapakahi Stream, being also the Northeast end of present wooden bridge, the true azimuth and distance of the said point to a pipe driving at the Northwest corner of Lot 10. Land Court Application 779 being $339^{\circ} 06' 28.75$ feet, and running by azimuths measured clockwise from true South:

1. $105^{\circ} 50' 170.00$ feet along the North side of right of way;
2. $15^{\circ} 50' 14.80$ feet along the West end of right of way;
3. $105^{\circ} 50' 105.80$ feet along the remaining portion of R.P. 5694 L. C. Aw. 6545 Apana 1 to Haalilio, to a pipe;
4. $199^{\circ} 50' 140.10$ feet along the same, to a pipe;
5. $294^{\circ} 16' 218.60$ feet along the South bank of the Kapakahi Stream;
6. $311^{\circ} 48' 25.54$ feet along the West bank of the Kapakahi Stream;
7. $348^{\circ} 10' 61.30$ feet along the West bank of the Kapakahi Stream;

8. $19^{\circ} 14' 27.50$ feet along the West bank of the Kapakahi Stream, to the point of beginning.

Containing an Area of 29,200 square feet, or 0.670 Acre, or thereabouts.

Together with fifty per cent (50%) of additional undivided interest of right of way to use in common with the owners and occupants of the above-mentioned lot and the remaining portion of L. C. Aw. 6545 Apana 1 to H. Haalilio being a road purpose only, which right of way is described as follows:

Beginning at the Northeast corner of this piece of land on the West bank of Kapakahi Stream, the true azimuth and distance of the said point of beginning to a pipe driven at the Northwest corner of Lot 10 of Land Court Application 779 being $339^{\circ} 06' 28.75$ feet and running by azimuths measured clockwise from true South:

1. $339^{\circ} 06' 17.46$ feet along the West bank of the Kapakahi Stream;
2. $105^{\circ} 50' 41.04$ feet;
3. $195^{\circ} 50' 14.80$ feet;
4. $285^{\circ} 50' 30.00$ feet to the point of beginning and containing an area of 526 square feet.

that the real property aforescribed is situated at Waipahu aforesaid within the jurisdiction of this court and there are three valuable buildings on the said property; that after January 2nd, 1933, aforesaid said Kaneichi Nii gave to the plaintiff any and all rentals derived from the premises aforescribed and plaintiff kept up with all expenses, the making of all improvements, payment of taxes and maintained the property; that after said date, said

Kaneichi Nii left the entire control and management of the said property to the plaintiff; that said Kaneichi Nii intended to have a deed properly executed to the plaintiff but in May, 1935, had [196] to hurriedly leave for Japan due to a severe illness of plaintiff's sister who was then in Japan; that at the time of Kaneichi Nii's leaving he left by way of gift everything he had whether by way of personal property or real property in the Territory of Hawaii to the plaintiff; that the foregoing gift was in full execution of the agreement, promise and covenant made by said Kaneichi Nii to the plaintiff in the year 1928 as aforescribed; that in further consideration of said gift plaintiff promised his father that he will look after and support plaintiff's minor sister who then resided with plaintiff as long as it was necessary that she be looked after and supported; that plaintiff looked after and supported said sister for many years thereafter;

VII.

That with relation to the real property aforescribed in paragraph VI although it was orally given to the plaintiff, there was never a deed executed in favor of the plaintiff from his father; that subsequent to May, 1935, for more than ten (10) continuous years the plaintiff took possession of the premises and openly, exclusively, adversely, continuously and without interruption held himself to be the owner of the premises aforescribed against the entire world; that since May, 1935, he possessed said property and collected all rentals due from the premises and kept the said rentals for his own use;

that since May, 1935, he paid all Territorial real property taxes on the premises; that since May, 1935, he considerably improved the premises with permanent improvements at his own labor and expense; that since May, 1935, he controlled the property in every respect as if he owned the property; that since May, 1935, he paid [197] gross income taxes to the Territory of Hawaii in his own name on the gross rentals from the premises; that since May, 1935, he paid in his own name net income taxes, both Territorial and Federal, on the rental income from the premises; that on July 23, 1938, he purchased from one T. Ota for the sum of \$175.00 by way of a deed duly executed by T. Ota, parcel 2 described in the Vesting Order, the exact description of which is as follows:

All of that certain parcel of land (portion of the land described in Royal Patent Number 5694, Land Commission Award Number 6545, Apana 1 to H. Haalilio and a portion of Boundary Certificate No. 20 to John Hamauku) situate, lying and being at Ohua, Waikele, in the District of Ewa, City and County of Honolulu, Territory of Hawaii, and thus bounded and described:

Parcel No. 2

Beginning at the Northeast corner of this piece of land the true azimuth and distance of the said point of beginning from a pipe driven at the Northwest corner of the Lot 10, Land Court Application 779, by traverse, being: (a) $159^{\circ} 06' 28.75$ feet and (b) $105^{\circ} 50' 30.0$ feet and running by azimuths measured clockwise from true South:

1. 15° 50' 14.8 feet;
2. 105° 50' 140.0 feet;
3. 195° 50' 14.8 feet;
4. 285° 50' 140.0 feet to the point of beginning.

Containing an area of 2.072 square feet, or thereabouts.

that it was put in the name of Kaneichi Nii because the adjoining parcel 1 was in the name of Kaneichi Nii and since parcel 1 was by way of gift already his, the plaintiff thought that no harm would be done in naming as grantee said Kaneichi Nii; that the foregoing acts were all in reliance of the gift of the said real property to him in May, 1935; and that Kaneichi Nii held said Parcel 2 in trust for plaintiff.

VIII.

That there were other real properties in Waipahu [198] left by gift to the plaintiff by his father in May, 1935, which were also parol gifts unsupported by deeds, but plaintiff in 1939 using powers of attorney from Kaneichi Nii and Saku Nii, wife of said Kaneichi Nii, sold said parcels and collected all proceeds from the sale of the said property for his own use and purpose.

IX.

That at the time of the gift in May, 1935, to the plaintiff, the property aforescribed in paragraph VI being situated in a remote part of Waipahu was not of much value; that plaintiff could have sold said properties described in paragraphs VI and VII as in the case of the property described in para-

graph VIII and invested said funds to his own use but instead kept the properties; that on or about 1940 four-laned paved highways have been constructed near the said properties and the value of the properties now is about ten times that of May, 1935; that its present value is about \$30,000.00 more or less; that if the properties described are not returned as prayed for in this cause to the plaintiff, the plaintiff will suffer great and irreparable damages; that plaintiff sacrificed his desire to be further educated and is now considered an uneducated person; that he deprived himself relying on the promise, agreement and covenant aforementioned the liberties and full enjoyment of life during his younger days; that plaintiff is and was since May, 1935, the beneficial and equitable owner of all of the two premises described; and that he is also entitled to the premises on grounds of adverse possession.

X.

That heretofore, to wit, on September 12, 1947, [199] the defendant in his capacity as successor to the Alien Property Custodian of the United States of America issued Vesting Order No. 9777, an exact copy of which Order is attached hereto and marked Exhibit "A" and hereby incorporated herein as if recited herein.

XI.

That by virtue of said Order the said properties are now vested in the defendant, Attorney General of the United States of America in his capacity as successor to the Alien Property Custodian, and the plaintiff has been illegally deprived of his proper-

ties by said Vesting Order; that since the issuance of the said Order the defendant through his agents have been illegally, unlawfully and contrary to law and the Constitution of the United States of America in complete control and possession of the premises collecting all rentals therefrom and will continue to do so, and plaintiff is informed and believes that defendant will sell said properties if the relief requested herein is not granted; and that such a sale would be illegal and contrary to the laws and the Constitution of the United States of America.

XII.

That the aforesaid wrongful and illegal possession, supervision and control of the properties have caused and will cause plaintiff irreparable damages.

XIII.

That the threatened sale of said real properties, if carried out, will cause irreparable damages to the plaintiff. [200]

XIV.

That prior to the filing of this suit the plaintiff duly made and filed with the Office of the Alien Property Custodian at Washington, District of Columbia, notice of his claim to said real properties under oath on Form APC 1-A and in such form and in such particulars required by said Alien Property Custodian, in conformity with and in pursuance to the statutes, requirements, and orders in such cases made and provided; that no hearing has been granted in connection with such claim and plaintiff has been informed that no hearing will be granted

immediately upon the filing of such claim; that he has been informed that the office of the Alien Property Custodian has not acted on claims filed years ago and there is no reason to believe that plaintiff's claim will be acted upon immediately.

XV.

That in addition to the vesting of the properties aforescribed the defendant in his capacity as successor to the Alien Property Custodian, through his agents, has illegally and unlawfully made written demands on the plaintiff to pay:

“That certain debt or other obligation owing to Kaneichi Nii, also known as Konichi Nii by Shozo Nii, doing business as S. Nii Store, arising out of rents collected from the property described in sub-paragraph 2-a hereof, and any and all rights to demand, enforce and collect the same.”

that plaintiff claims that since he was and is the beneficial and equitable owner of the premises as alleged in paragraphs V, VI, VII, IX, XI, XII and XIII, he did not and does not owe the debt above referred to in the Vesting Order to Kaneichi Nii or his successor the defendant; that in spite of such claims of the plaintiff the defendant through his agents [201] have insisted on the payment of the alleged debt; that the amount of the alleged debt claimed by the defendant through his agent is approximately \$3,500.00 to \$4,000.00; that if the defendant unlawfully, forcibly and summarily collects said alleged debt, the plaintiff will be required to

liquidate his store business in that he does not have sufficient cash to pay such a large sum of money; that if the relief as prayed for with relation to the matters alleged in this paragraph is not granted, the plaintiff will be permanently and irreparably damaged.

XVI.

That the plaintiff claims that the matter of the return of properties herein alleged and the matter of the existence or non-existence of the debt alleged in paragraph XV is so closely related that it should be settled in this single cause.

XVII.

That plaintiff has no adequate and speedy remedy at law.

Wherefore, plaintiff prays that a summons be issued out of this Court, directed to said Tom C. Clark, Attorney General as successor to the Alien Property Custodian, commanding him on a day certain, to appear and answer this bill of complaint as is by law provided, answer under oath being waived, and obey and perform such orders and decrees in the premises as to the Court may seem proper and required by the principles of equity and good conscience; and

The plaintiff prays that a decree be entered herein restraining the sale of the real properties described in [202] paragraphs VI and VII above by the defendant as well as his agents, employees and representatives pending determination of this action; that it be adjudged that the right and title in said real properties are in the plaintiff and that said plain-

tiff is entitled to the immediate possession thereof; and that an appropriate order be entered directing defendant to transfer and deliver to the plaintiff said real properties and to render a full, true and correct accounting of moneys received and collected from September 12, 1947, to the date of the transfer.

And as further relief the plaintiff prays that a decree be entered herein permanently enjoining the defendant from collecting the alleged debt alleged in paragraph XV above; that an order be entered declaring that the entire Vesting Order No. 9777 to be a nullity and of no effect.

The plaintiff prays for such other, further and different relief as to this Court may seem equitable, just and proper.

Dated at Honolulu, T. H., this 29th day of November, A. D. 1948.

/s/ SHOSO NII.

His Attorney:

/s/ SHIRO KASHIWA. [203]

Territory of Hawaii,
City and County of Honolulu—ss.

Shoso Nii, being first duly sworn, on oath, deposes and says: That he is the Plaintiff named in the foregoing Amended Complaint; that he has read the same, knows the contents thereof and that the same are true.

/s/ SHOSO NII.

Subscribed and sworn to before me this 29th day of November, A.D. 1948.

(Seal) /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires: August 9, 1951. [204]

Office of Alien Property
Department of Justice
Vesting Order 9777

Re: Real property and a claim owned by Kaneichi
Nii, also known as Konichi Nii.

[Printer's Note: Vesting Order 9777 is set
out in full as Exhibit "A" attached to Com-
plaint, page 13, of this printed Record.]

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Shiro Kashiwa, plaintiff's attorney, whose address is 307-308 Hawaiian Trust Building, Honolulu 48, T. H., an answer to the complaint which is herewith served upon you, within 10 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default

will be taken against you for the relief demanded in the complaint.

.....
Clerk of Court.

By
Deputy Clerk.

Date:[209]

[Title of District Court and Cause.]

MOTION TO REOPEN CASE TO TAKE ADDITIONAL TESTIMONY

Comes now Shoso Nii, Plaintiff above named, by his attorney, Shiro Kashiwa, and hereby moves that the trial of this cause be reopened so that further depositions of Kaneichi Nii may be taken in this cause and adduced as evidence in this cause.

As grounds for this motion Plaintiff alleges that there was a misinterpretation of a material answer from Japanese to English and from English to Japanese in that immediately after the deposition was taken Plaintiff was informed in a letter by Kaneichi Nii, the deponent, as follows:

"I was notified on the 5th day of October by the Consul in Kobe to appear at the Consulate by the 14th day of October. Pursuant to the notice, I appeared at the Consulate with Takako at 9 a.m. on the 14th of October and stated positively in detail that everything was left under your charge and that they were all definitely your properties. I believe, therefore, you will be duly notified by the Consul.

Consequently, I presume your ownership to all the properties will now be clearly established. Inasmuch as such should be the case, I feel my apprising you of the state of matters here so that you may not be the least bit discouraged will give you complete confidence." [211]

As further ground Plaintiff alleges that the answer to the following question to the deposition:

"Q. What did you do with all of your real properties in Hawaii when you last left Hawaii for Japan?"

was not responsive to the question and the unresponsive answer has unduly prejudiced the Plaintiff; that this cause may be only justifiably disposed of by receiving a direct answer to the question asked; that substantial justice in the cause cannot be had unless the said question is directly answered; that a direct answer to the question is material in this cause.

This motion is based on the affidavit attached hereto and upon the record and evidence already adduced in this cause.

Dated at Honolulu, T. H., this 9th day of December, A. D. 1948.

SHOSO NII,
Plaintiff,

By /s/ SHIRO KASHIWA,
His Attorney.

NOTICE OF MOTION

Please take notice that the foregoing Motion will be presented to the Honorable J. Frank McLaughlin at the hour of 2:30 o'clock p.m., on Monday, the 13th day of December, 1948, or as soon thereafter as counsel may be heard, in his Courtroom in the Federal Building, Honolulu, T. H.

Dated at Honolulu, T. H., this 9th day of October, 1948.

SHOSO NII,
Plaintiff,

By /s/ SHIRO KASHIWA,
His Attorney. [212]

AFFIDAVIT

Territory of Hawaii,
City and County of Honolulu—ss.

Shoso Nii, being first duly sworn, on oath deposes and says: That he is the plaintiff in this cause; that by a letter from Kaneichi Nii dated October 15, 1948, plaintiff was informed as follows:

“I was notified on the 5th day of October by the Consul in Kobe to appeal at the Consulate by the 14th day of October. Pursuant to the notice, I appeared at the Consulate with Takako at 9 a.m. on the 14th of October and stated positively in detail that everything was left under your charge and that they were all definitely your properties. I believe, therefore, you will be duly notified by the Consul. Conse-

quently, I presume your ownership to all the properties will now be clearly established. Inasmuch as such should be the case, I feel my apprising you of the state of matters here so that you may not be the least bit discouraged will give you complete confidence.”

that said letter was in Kaneichi Nii's writing and plaintiff can positively identify said letter as said Kaneichi Nii's letter; that the letter is not consistent with the answers in the deposition; that said letter is in the possession of the plaintiff; that [213] plaintiff did not show the letter to plaintiff's attorney till about 3 or 4 days after the end of the case because he did not think that the said letter could be used in any way as evidence in the cause; that plaintiff makes this affidavit in support of the motion attached hereto;

And further affiant sayeth not.

/s/ SHOSO NII.

Subscribed and sworn to before me this 9th day of December, A. D. 1948.

(Seal) /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires August 9, 1951.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 9, 1948. [214]

[Title of District Court and Cause.]

MEMORANDUM OF TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, IN OPPOSITION TO MOTION TO REOPEN CASE TO TAKE ADDITIONAL TESTIMONY, FILED BY SHOSO NII.

Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, Defendant and Counter-Plaintiff, files this memorandum in opposition to the "Motion to Reopen Case to Take Additional Testimony," filed herein by the Plaintiff and Counter-Deefndant, Shoso Nii, on December 9, 1948, and for grounds of opposition respectfully directs the Honorable Court's attention, among other things, to the following:

(1) The Complaint in this case was filed on January 5, 1948. The trial of the issues commenced on November 29, 1948, and continued to and including December 1, 1948. At the conclusion of the Plaintiff's case, this Honorable Court was very specific in inquiring of Plaintiff's counsel [215] whether Plaintiff's counsel had additional evidence which he desired to introduce, and Plaintiff's counsel positively stated that he had no such evidence. The court decided the issues in this case on December 1, 1948, after a painstaking, thorough, complete, fair, and impartial trial. A transcript of the court's oral opinion is as follows:

“I do not feel in this matter that I need the assistance of legal briefs for two reasons: one, the plaintiff here has the burden of convincing the court by preponderance of credible evidence that the allegations of the complaint are **true and correct**. Ingenious as is the legal theory upon which the plaintiff bases his case, the proof that has been adduced by the plaintiff does not bring conviction to my mind that in fact a gift of this real property was made to him by his father. Secondly, assuming that an equitable gift of the property was made by the father to the son in 1935, the acts and actions of the father subsequent to that date do not support the plaintiff’s contentions. Indeed, the father testifying in this case does not in the slightest degree corroborate the plaintiff’s contentions here made. Over and beyond that, the acts of the father and of the plaintiff himself during the years 1935 to 1947, at which time the custodian vested the property, are contradictions of the theory here advanced.

“I am satisfied that the father was an intelligent person, though he may have been uneducated, and did well in his business at Waipahu and, as has been pointed out, he knew what to do when he wanted to effectively dispose of property, for prior to going to Japan in 1933 he properly and duly executed a bill of sale for the store in favor of his son. And I am certain that preparing to go to Japan permanently, if he had promised his son, as the son contends, that prior to leaving he certainly would have taken steps to execute the

proper deed of the real property in Hawaii to his son, he certainly knew how to execute a will to take care of the disposition of his property after death.

“Further, in 1939, though he here now claims the property was equitably his since 1935—The son conferring first apparently with someone here in Honolulu who purported to advise him legally—the son asked the father not for a deed to the property which he claimed was given to him but rather for a power of attorney from the father and the mother to deal with the parents’ property here in Hawaii.

“All of those facts and factors which I have outlined lead me to the conclusion that the plaintiff has not substantiated by credible proof the allegations of the complaint. And further, assuming that he had, I am still satisfied, as indicated in my *Fujino* decision, that the Alien Property Custodian with respect to real property stands in the position of a purchaser for value and is protected by the recording statutes of the Territory. Those being my conclusions and findings, the court will approve findings of fact and conclusions of law consistent with this [216] outline of my opinion and will sign them upon presentation, and will include an order previously held up directing the plaintiff to turn over to the custodian the rents that have come into the plaintiff’s possession since the time when the plaintiff collected the rents from his father’s property; in other words, the turn-over directive that heretofore has been denied will

at this time be granted, and I will sign an order to that effect on presentation."

(2) The "Motion to Reopen Case" fails to state any legal authority for the presentation of such motion.

(3) This "Motion to Reopen Case" is a thinly disguised effort to impeach the testimony of the Plaintiff's father, Kaneichi Nii, who was originally sworn to testify and did testify in these proceedings on behalf of the Plaintiff. Plaintiff's counsel endeavored to impeach the testimony of Kaneichi Nii, his own witness, during the trial of this case, and this Honorable Court ruled that Plaintiff's counsel had no authority to impeach the testimony of his own witness.

(4) If, as alleged, the purpose for reopening the case is to take additional testimony, it is obvious from the motion itself that such additional testimony would be that of witnesses for the Plaintiff, who were given full and ample opportunity to testify at the time of the trial.

(5) Nowhere in the "Motion to Reopen Case to Take Additional Testimony" does it appear that the Plaintiff has, in such form that it would be legally admissible, any competent, relevant, or material additional evidence to introduce into this case. The alleged letter from Kaneichi Nii to Shoso Nii was allegedly written one day after Kaneichi Nii answered the interrogatories propounded to him by Plaintiff's counsel. Kaneichi Nii's answers to these interrogatories have been on file with the Clerk of this court since October

26, 1948. There is nothing in the "Motion to Reopen Case" which presents an adequate and sufficient legal excuse for Plaintiff's failure to present the contents of the alleged letter from Plaintiff's father at the time of the trial of the issues before this Honorable Court.

(6) The Motion to Reopen does not set forth the original letter, allegedly received the Plaintiff's father, nor the envelope in which it [217] was mailed, nor does Plaintiff offer any evidence which is admissible under the recognized rules of evidence. Plaintiff merely offers his own self-serving statement based upon an alleged translation of an alleged letter. Plaintiff purports thereby to contradict the sworn testimony of his own father, his own witness, who was permitted to testify freely as a witness for his own son and who could not possibly have been confused by cross-interrogatories by the Defendant or Defendant's counsel, because none were presented.

Respectfully submitted,

TOM C. CLARK,

Attorney General, as Successor to the Alien Property Custodian.

By /s/ RAY J. O'BRIEN,

United States Attorney.

By /s/ HOWARD K. HODDICK,

Assistant United States Attorney.

By /s/ LEON R. GROSS,

Attorney.

[Endorsed]: Filed Dec. 13, 1948. [218]

[Title of District Court and Cause.]

MOTION FOR FINDINGS OF FACTS

Comes now Shoso Nii, Plaintiff above named, by his attorney, Shiro Kashiwa, and hereby moves that the following findings of facts as required under Rule 52 (a) of the Rules of Civil Procedure in the District Court of the United States be made by this Court:

FINDINGS OF FACTS

1. This Court has jurisdiction of the parties and of the subject matter;

2. This action is brought under Section 9 (a) of the Trading With the Enemy Act, as amended (50 U.S.C.A. Section 9 (a)) and for other relief; that proper claims for the return of the properties involved in this cause were filed with the Alien Property Custodian prior to the bringing of this suit;

3. This proceeding involves two parcels of real estate, one improved with three rental units and the other unimproved, used for right of way purposes to the improved lot, located at Waipahu, Island of Oahu, Territory of Hawaii, United [220] States of America, which were vested by the Attorney General of the United States, as successor to the Alien Property Custodian, under authority of the Trading With the Enemy Act, as amended (U.S.C.A. Title 50), by Vesting Order No. 9777, dated September 12, 1947, signed by the Attorney

General of the United States, as successor to the Alien Property Custodian;

4. Kaneichi Nii, Plaintiff's father, was born in Japan and came to live in the Hawaiian Islands more than thirty years ago. With the exception of certain trips which he made to Japan, Kaneichi Nii continued to reside in the Territory of Hawaii until 1935, at which time Kaneichi Nii permanently returned to Japan and said Kaneichi Nii has remained in Japan as a citizen and resident of Japan since 1935 to and including the present time. At the time of the vesting of the real estate and at the present time, Kaneichi Nii was and is a citizen and a resident of Japan; that when Kaneichi Nii returned to Japan in 1935 he had sufficient properties and investments in Japan to take care of him for the rest of his life;

5. During the time that Kaneichi Nii lived in the Territory of Hawaii, he acquired various properties, and the two parcels of real estate which is the subject matter of this case is part of those properties. That up to January 3, 1933, Kaneichi Nii's property also included a general merchandise store located at Waipahu, Oahu, T. H., known as "K. Nii Shoten"; that the said "K. Nii Shoten" was not and is not situated on the parcels in question;

6. The real estate which is the subject matter of this lawsuit was acquired by Kaneichi Nii for the total consideration of \$2,250.00 from T. Ota and Yasu Ota, his wife, by deed to Kaneichi Nii dated December 27, 1932, recorded December [221] 27,

1932, in the Office of the Registrar of Conveyances for the City and County of Honolulu, T. H., at Liber 1189, pages 91-93, inclusive; and by deed from T. Ota and Yasu Ota, his wife, for the total consideration of \$175.00 to Kaneichi Nii, dated July 23, 1938, and recorded in the Office of the Registrar of Conveyances for the City and County of Honolulu, T. H., on July 23, 1938, at Liber 1451, pages 418-420, inclusive. True and correct copies of these deeds have been introduced in evidence and are a part of the record herein. The legal description of the real estate is correctly set forth in Vesting Order 9777;

7. Record title at the Bureau of Conveyances, Honolulu, Territory of Hawaii, to the two parcels of real estate conveyed by the above-mentioned deeds remained in Kaneichi Nii from the respective dates of their acquisition from T. Ota and Yasu Ota, his wife, down to and including the date that they were vested by the Attorney General of the United States. The title to both properties were not Land Court Titles (Torrens System) but were recorded under the regular system of "non-Land Court Titles";

8. That the Territory of Hawaii levied and assessed real estate taxes against these parcels in the name of Kaneichi Nii and such taxes were paid annually by Shoso Nii after Kaneichi Nii departed for Japan in 1935 to the date of the Vesting Order;

9. That from the time Kaneichi Nii left for Japan in 1935 up to the effective date of the Vest-

ing Order, Shoso Nii collected as his own all rentals from the property in dispute; that Shoso Nii paid to the Territory of Hawaii in Shoso Nii's name gross income taxes on the gross rental derived from the premises; that Shoso Nii paid to the Territory of Hawaii in Shoso Nii's name net income taxes due to the Territory of Hawaii for the rental collected; that Shoso Nii paid to the United States of America through the Bureau of Internal Revenue net income taxes in the name of Shoso Nii on the rentals collected; that Shoso Nii paid for all expenses of upkeep of the property; that between June, 1941, to the date of the Vesting Order above mentioned Shoso Nii acted under and through his attorney-in-fact, Katsutoshi Mikami, who held a duly executed and recorded power of attorney signed by Shoso Nii which is in evidence in this cause;

10. That Shoso Nii, the Plaintiff herein, was born on January 3, 1914, in the Territory of Hawaii, and by virtue of his birth within the United States is a citizen of the United States of America, and is the only son of Kaneichi Nii. Kaneichi Nii and his wife, Saku Nii, had three daughters, one of whom died. The other two daughters now live with their parents in Japan. Shoso Nii made two trips to Japan, one in 1920 while yet a minor, and he was then there for about a year, and again in June, 1941, to visit his ill father, that during his said visit in 1941 he was unable to return to Hawaii because of the intervening war; that he returned to Hawaii on November 8, 1947; that during

said period June, 1941, to November 8, 1947, he was a resident of the Territory of Hawaii; that at the time of filing of this suit Shoso Nii was a resident of the Territory of Hawaii;

11. That Plaintiff Shoso Nii on or about 1928 graduated from the eighth grade of Waipahu Elementary School and made application for registration at the Kalahaua Junior High School in Honolulu; that he was accepted for enrollment by the said Kalakaua Junior High School; that he did not continue his studies there but instead helped Kaneichi Nii, his father, at said Kaneichi Nii's store; that said Kaneichi Nii at said time and repeatedly thereafter promised Shoso Nii all of said Kaneichi Nii's property in [223] Hawaii at the time of said Kaneichi Nii's death or if said Kaneichi Nii left for Japan if Shoso Nii left school and helped at the said store; that the fact that there was such an agreement is corroborated by the testimony of Mr. Ikinaga and by the evidence of written entries made in the books of the Waipahu Garage, Ltd., a corporation in which Kaneichi Nii was a record stockholder up to 1939, showing that in spite of the fact that Kaneichi Nii remained the record stockholder, Shoso Nii received dividends in the name of Shoso Nii up to the time of the change of the stock record; that said Shoso Nii relied on said promise and gave up going to school and without any wages put in long hours of work every day including Sundays helping at the Kaneichi Nii's store up to January 2, 1933;

12. As of January 2, 1933, Kaneichi Nii, the

father, desired to partially and prematurely execute the aforementioned promise and made a gift of the father's store located at Waipahu to Shoso Nii. Kaneichi Nii made, executed and delivered a Bill of Sale which was duly recorded, and effectively made a gift of said store to said son. Bank accounts in the name of the father at the Waipahu Branch of the Bank of Hawaii were also transferred to the son when the Bill of Sale was made. A true and correct copy of the said Bill of Sale is in evidence. Said Bill of Sale is recorded in the Office of the Registrar of Conveyances for the City and County of Honolulu at Liber 1205, page 26;

13. That on the 17th day of December, 1932, said Kaneichi Nii made a will in accordance with the promise aforementioned in paragraph 11 bequeathing all of his properties, both real and personal, to the plaintiff;

14. That plaintiff in reliance on the promise aforementioned in paragraph 11 built two (2) two-bedroom houses on [224] the premises in dispute and a substantial stone wall to keep the water of the Waipahu river from flooding the premises at the total expense to him of about \$3,000.00;

15. In 1938 the plaintiff negotiated for the purchase of the second and smaller parcel of real estate which is part of the property involved in this proceeding and serves as a right of way to the larger parcel in dispute. The plaintiff was able to direct the form and in whose name this deed was to be executed. The plaintiff caused title to the second parcel of real estate to be taken in the name of his

father, Kaneichi Nii, because the right of way was to be appurtenant to the main parcel. Plaintiff at that time knew that title to the larger parcel of real estate also was in the name of his father, Kaneichi Nii; that the entire consideration for the small parcel was paid by Shoso Nii;

16. In 1939 Shoso Nii caused two powers of attorney to be drafted by an accountant without legal advice and forwarded them to Japan, where the said powers of attorney were duly executed by Kaneichi Nii and Saku Nii (mother of the plaintiff), and said powers of attorney were acknowledged before a Vice Consul of the United States of America at Kobe, Japan, on February 7, 1939, and returned to the Territory of Hawaii and duly recorded in the Office of the Registrar of Conveyances. True and correct copies of said powers of attorney have been introduced into evidence as part of the record in this cause;

17. That subsequent to May, 1935, up to the date of the Vesting Order, plaintiff had possession of the premises in dispute; his tenants lived on the premises in dispute;

18. That for more than ten (10) years continuously and without interruption plaintiff had the open, exclusive, adverse and continuous possession of the premises in dispute; [225]

19. That in 1935 just before Kaneichi Nii's departure to Japan said Kaneichi Nii orally told Shoso Nii he did give all of his properties to the plaintiff; that said gift was in accordance with the promise aforementioned in paragraph 11;

20. That plaintiff's father had to leave for Japan in 1935 sooner than he had expected rather suddenly because of the sudden aggravation of the illness of his daughter, who was then ill in Japan; that that fact that she was ill is well established by the testimony of her husband, Jinichi Tsumoto;

21. That because Kaneichi Nii had to depart suddenly for Japan in 1935, no deed of any nature whatsoever was executed by Kaneichi Nii; that there was another parcel of property in Waipahu which remained in the name of Kaneichi Nii close to the property in dispute; that in 1940 Shoso Nii sold this property to Attorney Oliver Kinney and kept for himself the consideration paid by said Attorney Oliver Kinney.

This motion is based on the records of this cause, upon the admissions by the defendant on the pleadings of this cause and upon the evidence that was adduced in this cause.

Dated at Honolulu, T. H., this 15th day of December, A.D. 1948.

SHOSO NII,
Plaintiff.

By /s/ SHIRO KASHIWA,
His Attorney.

[Endorsed]: Filed Dec. 15, 1948. [226]

[Title of District Court and Cause.]

FINDINGS OF FACT BY THE COURT AFTER A TRIAL OF THE ISSUES

This cause having come on for a trial of the issues upon the Complaint filed herein by the Plaintiff and the Answer thereto filed by the Defendant, and upon the Counterclaim filed herein by the Defendant and Counter Plaintiff and the Answer to said Counterclaim filed herein by the Plaintiff and Counter Defendant; the issues in this cause having been submitted to the Court upon the testimony and evidence and exhibits of the respective parties introduced at the trial held on November 29, 1948, November 30, 1948, and December 1, 1948, and the Court having heard the arguments of counsel and being fully advised in the premises; doth find: [227]

1. This Court has jurisdiction of the parties and of the subject matter;

2. This action is brought under Section 9(a) of the Trading with the Enemy Act, as Amended (50 U.S.C.A. Section 9(a)) and for other relief;

3. These proceedings involve two adjacent parcels of real estate, one unimproved (which shall be called "the small parcel"), the other improved (which shall be called "the large parcel"), located in Waipahu, Island of Oahu, Territory of Hawaii, which were vested by the Attorney General of the United States, as successor to the Alien Property Custodian, under authority of the Trading with the Enemy Act, as Amended (U.S.C.A. Title 50), by Vesting Order No. 9777, dated September 12, 1947, signed by the Attor-

ney General of the United States, as successor to the Alien Property Custodian;

4. The real estate was vested as “property within the United States owned or controlled by Kaneichi Nii, a resident and a national of a designated enemy country (Japan)”;

5. Kaneichi Nii, plaintiff’s father, was born in Japan and came to live in the Hawaiian Islands more than thirty years ago. With the exception of certain trips which he made to Japan, Kaneichi Nii continued to live in the Territory of Hawaii until 1935, at which time Kaneichi Nii returned to Japan and said Kaneichi Nii has remained in Japan as a citizen and resident of Japan since 1935 to and including the present time. At the time of the vesting of the real estate and at the present time, Kaneichi Nii was and is a citizen and a resident of Japan. When Kaneichi Nii returned to Japan in 1935, he had property in Japan;

6. During the time that Kaneichi Nii lived in the Territory of Hawaii, he acquired various property, and the real estate which is the subject matter of this lawsuit is part of that property. [228] Kaneichi Nii’s property also included a general merchandise store located at Waipahu, Oahu, T. H., known as “K. Nii Shoten”;

7. The large parcel of real estate which is the subject matter of this lawsuit was acquired by Kaneichi Nii for a recited consideration of \$2,250.00 from T. Ota and Yasu Ota, his wife, by deed to Kaneichi Nii dated December 27, 1932, recorded December 27, 1932, in the Office of the Registrar of Conveyances for the City and County of Honolulu, T. H., at Liber

1189, pages 91-93, inclusive. The small parcel of real estate was acquired for a recited consideration of \$100.00 by deed from T. Ota and Yasu Ota, his wife, to Kaneichi Nii, dated July 23, 1938, and recorded in the Office of the Registrar of Conveyances for the City and County of Honolulu, T. H., on July 23, 1938, at Liber 1451, pages 418-420, inclusive;

8. Record title to the two parcels of real estate conveyed by the above-mentioned deeds remained in Kaneichi Nii from the date of their acquisition from T. Ota and Yasu Ota, his wife, down to and including the date that they were vested by the Attorney General of the United States. The titles to both properties were not Land Court titles;

9. The Territory of Hawaii levied and assessed real estate taxes against these parcels in the name of Kaneichi Nii and such taxes were paid by Kaneichi Nii prior to his departure to Japan in 1935, and since 1935 said taxes were paid for Kaneichi Nii by Shoso Nii in the name of Kaneichi Nii up to and including the time that the parcels were vested by the Attorney General of the United States, as successor to the Alien Property Custodian;

10. Shoso Nii, the plaintiff herein, was born on January 3, 1914, in the Territory of Hawaii, and is a citizen of the United States of America and the only son of Kaneichi Nii. Kaneichi Nii and his wife, Saku Nii, had three daughters, one of whom died. The other two daughters live with their parents in Japan. Shoso Nii [229] made two trips to Japan, one in 1920 and one in 1941. He lived in Japan with his father, Kaneichi Nii, from July, 1941, to October,

1947, at which time he returned to his home in Hawaii, where he has since resided ;

11. As of January 2, 1933, Kaneichi Nii, the father of Shoso Nii, made, executed, and delivered a Bill of Sale conveying the father's store at Waipahu, Oahu, T. H., to Shoso Nii, his son. This Bill of Sale was duly recorded and effectively made a gift of said store to said son. A true and correct copy of said Bill of Sale is in evidence. (Exhibit A). Said Bill of Sale is recorded in the Office of the Registrar of Conveyances for the City and County of Honolulu at Liber 1205, page 26 ;

12. In 1938 the plaintiff negotiated for the purchase of the small parcel of real estate which is part of the property involved in these proceedings. The plaintiff cause the deed to the small parcel of real estate to be made out in the name of Kaneichi Nii, his father, as grantee. At that time the plaintiff knew that title to he large parcel of real esate was also in the name of his father, Kaneichi Nii ;

13. In 1939, Shoso Nii caused two powers of attorney to be drafted and forwarded to Japan, where the said powers of attorney were duly executed by Kaneichi Nii and Saku Nii (mother of the plaintiff), and said powers of attorney were acknowledged before a Vice Consul of the United States of America at Kobe, Japan, on February 7, 1949, and returned to the Territory of Hawaii and duly recorded in the Office of the Registrar of Conveyances (Exhibit No. I and Exhibit J) ;

14. On October 14, 1948, Kaneichi Nii, plaintiff's father, testified in these proceedings and referred to

the real estate which is the subject matter of these proceedings as "my properties in Hawaii". [230]

15. Shoso Nii, the plaintiff herein, by instrument duly executed and recorded in the Bureau of Conveyances (Exhibit C) constituted Katsutoshi Mikami, his attorney-in-fact, and at the time that the real estate, which is the subject matter of this lawsuit, was vested, Katsutoshi Mikami was the attorney-in-fact for Shoso Nii. A copy of Vesting Order No. 9777, dated September 12, 1947, was served upon Katsutoshi Mikami and received by him.

16. At the time that he filed his answer in these proceedings, the defendant filed a counterclaim under Section 17 of the Trading with the Enemy Act, as Amended (50 U.S.C.A. Section 17) and the plaintiff filed an answer to the counterclaim of the Defendant;

17. Vesting Order 9777, dated September 12, 1947, vested among other things:

"(a) Real property situated at Waikele, Wai-pahu, Oahu, T. H., particularly described in Exhibit A, attached hereto and by reference made a part hereof, together with all hereditaments, fixtures, improvements and appurtenances, thereto, and any and all claims for rents, refunds, benefits or other payments arising from the ownership of such property, and

"(b) That certain debt or other obligation owing to Kaneichi Nii, also known as Kenichi Nii by Shoso Nii, doing business as S. Nii Store, arising out of rents collected from the property described in subparagraph 2-a hereof, and any and all rights to demand, enforce and collect the same."

18. Katsutoshi Mikami, the duly authorized at-

torney-in-fact for Shoso Nii, the plaintiff, filed an accounting with the defendant-and-counter-plaintiff for the rental income from the real estate herein involved for the period July 1, 1941, through October, 1947, and a copy of the accounting submitted by said Katsutoshi Mikami is in evidence in these proceedings (Exhibit 3-D). This accounting shows that Shoso Nii is now liable to pay to the defendant-and-counter-plaintiff the sum of \$3,169.01 for the period from July 1, 1941, through October, 1947. [231] However, neither Shoso Nii nor any person acting on his behalf has made any accounting to the defendant-and-counter-plaintiff for the income for the period from May, 1935, to and including July, 1941.

19. Under and by virtue of Vesting Order No. 9777, the Attorney General of the United States, as Successor to the Alien Property Custodian, is entitled to obtain from Shoso Nii, the plaintiff, an accounting and a payment of all the net income from the subject real estate for the period May, 1935, to June 30, 1941, inclusive.

20. A Turnover Directive addressed to Shoso Nii and directing that he turn over the aforementioned sum of \$3,169.01 was served on Shoso Nii on August 30, 1948, by the defendant-and-counter-plaintiff, but up to and including the present date, Shoso Nii has not complied with the said Turnover Directive.

21. On October 26, 1948, the defendant-and-counter-plaintiff filed a petition in these proceedings under Section 17 of the Trading with the Enemy Act requesting an order of Court directing Shoso Nii to pay the aforesaid sum of \$3,169.01 to the counter-plaintiff, but the Court held in abeyance its ruling

on said petition until such time as there should be a final adjudication of the issues in this case.

Dated at Honolulu, T. H., January 26, 1949.

/s/ J. FRANK McLAUGHLIN,

Judge of the United States District Court of the Territory of Hawaii.

Approved as to form:

.....,
Attorney for Shoso Nii.

/s/ RAY J. O'BRIEN,

/s/ LEON R. GROSS,

Attorneys for the Attorney General of the United States, as Successor to the Alien Property Custodian.

Receipt of copy acknowledged.

/s/ SHIRO KASHIWA,

Attorney for Shoso Nii.

[Endorsed]: Filed Jan. 26, 1949. [232]

[Title of District Court and Cause.]

CONCLUSIONS OF LAW

1. The plaintiff has failed to establish his interest in the vested property in that his claim to having had at the date of vesting an equitable title by way of gift to the larger tract is not supported by convincing satisfactory evidence.

2. As to both parcels, the record title to each upon the date of vesting stood in the father's name, and the Custodian stands in the same position as a bona

fide purchaser for value, thus cutting off any and all equities which the plaintiff might otherwise have had against his father with respect to the vested property.

3. Upon the counterclaim the Custodian is entitled to recover all rents collected by the plaintiff from his father's premises from May, 1935, to the date upon which the obligation to pay over the same to his father was vested in the Custodian, namely September 12, 1947.

As to said net rents for the period July 1, 1941, to September 12, 1947, the plaintiff's attorney-in-fact during said period having accounted for the same in the sum of Three Thousand One Hundred Sixty-Nine Dollars and One Cent (\$3,169.01), the order to enforce the turnover directive heretofore withheld will now issue and be complied with within thirty (30) days and moneys paid over pursuant thereto shall be credited against the judgment on the counterclaim.

For the period May, 1935, to July 1, 1941, the plaintiff shall account within thirty (30) days for net rents collected by him from said premises.

Dated at Honolulu, T. H., January 26, 1949.

/s/ J. FRANK McLAUGHLIN,
Judge.

[Endorsed]: Filed Jan. 26, 1949. [235]

In the United States District Court
for the District of Hawaii

Civil No. 837

SHOSO NII,

Plaintiff,

vs.

TOM C. CLARK, Attorney General as Successor to
the Alien Property Custodian,

Defendant.

and

TOM C. CLARK, Attorney General as Successor to
the Alien Property Custodian,

Counter Plaintiff,

vs.

SHOSO NII,

Counter Defendant.

OPINION

An oral decision was rendered in this matter at the conclusion of lengthy arguments following the trial.

As a supplement thereto, this memorandum opinion is prepared to accompany the formal Findings of Fact and Conclusions of Law.

The facts found, as I have already indicated, do not bring to my mind a conviction that the plaintiff's father made a gift to him of all of his real estate in Hawaii, as alleged, in 1935.

The gift allegedly made, it is argued, was made at [237] the last supper of the family prior to the father's permanent departure for Japan. The only evidence upon the point is the plaintiff's uncorrobo-

rated testimony to the effect that upon this occasion his father made an oral gift to the plaintiff of all of his real estate in Hawaii. Upon this bald assertion the plaintiff spells out a theory of an equitable gift good as against the Custodian, for it is admitted in the face of the record that legal title then and until the date of vesting in September, 1947, remained in the father.

In an attempt to bolster up his own testimony upon this point, the plaintiff

(a) States that from the time he was graduated from grammar school and was registered to enter high school his father prevailed upon him to cease his schooling and to come into the store with him, in exchange for which the father promised to give the plaintiff, when he went to Japan permanently, all of his property in Hawaii. This promise we may assume, though also resting upon plaintiff's testimony alone, was made, and as plaintiff says, repeated from time to time whenever plaintiff got restless and expressed a desire to return to school. Indeed, it appears that to have his way the father arranged to provide the son with both a wife and an automobile.

(b) Produces a document said to be a will executed by the father in 1932 which if valid when the father dies would give all his property to the plaintiff. This document oddly issues out of plaintiff's possession, but the fact that it bears the father's signature is corroborated. The plaintiff relies upon this document as taking the case [238] out of the Statute of Frauds, it being a writing signed by the party through whom the Custodian claims. The writing,

however, was not intended to be effective until the father died, and he is still alive.

(c) Points to the conceded fact that in 1933 the father by bill of sale gave the plaintiff his store, and put a savings account, presumably the store's, in the plaintiff's name.

(d) States that he built and paid for two houses upon the large parcel of land in dispute; collected and kept the rents; and paid all Federal and Territorial taxes with respect thereto, which were billed to his father as to real estate taxes.

(e) Points to the fact that his father prior to leaving for Japan told, as the witness Ikinaga testified, Ikinaga that he was going to give all his property in Hawaii to the plaintiff. And further since 1936 although the father's stock in the Waipahu Garage stood in the father's name, Ikinaga paid the dividends to the plaintiff as the father had told him to do so. Not until 1939 did the corporation, however, transfer the stock to the plaintiff's name, but it did so then pursuant to the plaintiff signing the certificates "Kaneichi Nii by Shoso Nii." At this time the plaintiff had his father's power of attorney, although the stock transfer does not reflect it.

(f) Points to the fact that in 1940 the plaintiff sold, by using the power of attorney from his father, a piece of real estate standing in his father's name and kept the proceeds. [239]

Over and against these things to which the plaintiff points and upon which he argues an equitable gift of real property are the undisputed facts that:

1. The father testified by way of deposition that prior to going to Japan he verbally gave the store

to his son (he apparently forgets the bill of sale), and that after returning to Japan “* * * I made a power of attorney to Shoso Nii at the American Consulate in Kobe about December, 1935, to dispose of my properties in Hawaii.” This power of attorney the plaintiff himself had prepared in Hawaii and sent to his father in Japan for execution, which time of course was subsequent to the alleged equitable gift. The plaintiff is unable to explain why if the property was his as claimed, he asked for and received a power of attorney from his father instead of a deed. Clearly, the father knew how to dispose of his property effectively if he wished to, as illustrated by the bill of sale to the store and his purported will, and had he given the real estate to the plaintiff would have then or later given him a deed and not a power of attorney to deal with property he still maintained was his, the father’s.

After trial and decision, the plaintiff moved to reopen the case to take the father’s deposition anew. The plaintiff then produced a letter from his father saying he did not understand the interpreter. The motion was denied, for the record clearly shows that before signing Exhibit B plaintiff’s sister was sworn to interpret the then typed deposition to her father before he signed it.

Maybe the father misled the son, but the uncontradicted [240] evidence is that the father states he gave the son a power of attorney to deal with “my” property in Hawaii and the plaintiff accepted it and acted under it.

And even if I were satisfied with the plaintiff’s story—which I am not—as to the larger parcel of

real estate and also as to the smaller one serving as a right of way to the larger tract which the plaintiff bought but oddly took title thereto in his father's name—as to both—a further reason for concluding that the plaintiff cannot here recover is that the Custodian was entitled to rely upon the record title in the same manner and to the same extent as a bona fide purchaser would have been. Any equities which the plaintiff might have had were thus cut off when the property was vested as the father's, and as the records of the Territorial Bureau of Conveyances showed it to be.

The plaintiff having failed to prove his interest in the vested property by a preponderance of credible evidence, the prayer of the complaint is denied.

Upon the counterclaim the Custodian is entitled to judgment.

The withheld order enforcing the turnover directive will now issue requiring the plaintiff to turn over within thirty (30) days Three Thousand One Hundred Sixty-nine Dollars and One Cent (\$3,-169.01), representing accounted for net rentals from the premises from July 1, 1941, to September 12, 1947.

The plaintiff will also account for net rentals within thirty (30) days for the period May, 1935, to July 1, 1941.

Dated at Honolulu, T. H., January 26, 1949.

/s/ J. FRANK McLAUGHLIN,
Judge.

[Endorsed]: Filed Jan. 26, 1949. [241]

In the United States District Court
for the Territory of Hawaii

Civil No. 837

SHOSO NII,

Plaintiff,

vs.

TOM C. CLARK, Attorney General as Successor to
the Alien Property Custodian,

Defendant.

and

TOM C. CLARK, Attorney General as Successor to
the Alien Property Custodian,

Counter Plaintiff,

vs.

SHOSO NII,

Counter Defendant.

JUDGMENT ORDER

This cause having come on for a trial of the issues upon the Complaint filed herein by the Plaintiff and the Answer thereto filed by the Defendant, and upon the Counterclaim filed herein by the Defendant and Counter-Plaintiff and the Answer to said Counterclaim filed herein by the Plaintiff and Counter-Defendant; a trial of the issues having been had, and this cause having been submitted to the Court upon the testimony and evidence and exhibits of the respective parties introduced at the trial held on November 29, 1948, November 30, 1948, and December 1, 1948; the Court having heard the arguments of counsel, and being fully advised in the premises; and the [242] Court having entered its Findings of Fact and Conclusions of Law, and having filed its Memorandum Opinion in these proceedings;

It Is Hereby Ordered, Adjudged, and Decreed as follows:

1. Kaneichi Nii, also known as Kenichi Nii, is an enemy alien and a national of a designated enemy country (Japan) within the meaning of the Trading with the Enemy Act, as amended, (U.S.C.A. Title 50), and executive orders issued under and pursuant thereto;

2. At the date of vesting, the real property involved in this action was "property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of (a) "national of a designated enemy country (Japan);"

3. The Plaintiff, Shoso Nii, has no interest, right, or title in the real property within the meaning of Section 9 of the Trading with the Enemy Act, as amended;

4. The Complaint filed by Shoso Nii is hereby dismissed, and costs are assessed against Shoso Nii in the sum of Thirty and 18/100 Dollars (\$30.18);

5. Shoso Nii shall, on or before February 23, 1949, account for and pay over to the Attorney General of the United States, as Successor to the Alien Property Custodian, all of the net income from the real property vested under Vesting Order No. 9777, for the period May 1, 1935, to and including October 1, 1947.

Dated at Honolulu, T. H., January 26, 1949.

/s/ J. FRANK McLAUGHLIN,
Judge, United States District Court for the Territory
of Hawaii.

Entered in Docket 1-27-49.

[Endorsed]: Filed Jan. 26, 1949. [243]

[Title of District Court and Cause.]

ORDER DIRECTING ACCOUNTING AND PAY-
MENT UNDER SECTION 17, TITLE 50,
U.S.C.A., AS AMENDED

Now, on this 26th day of January, A.D. 1949, it appearing to the Court that on October 26, 1948, the Attorney General of the United States, as Successor to the Alien Property Custodian, Counter Plaintiff, did file in these proceedings his petition pursuant to Section 17 of the Trading with the Enemy Act, as amended (U.S.C.A. Title 50, Section 17), and it further appearing that on October 28, 1948, an Amended Order and Rule to Show Cause was issued by this Court directed to Shoso Nii as Counter Defendant; and

It further appearing that this Court reserved its ruling upon the petition of the Attorney General of the United States under Section 17 of the Trading with the Enemy Act until after there had been a trial of the issues in this cause; and [244]

It now appearing that there has been a trial of the issues in this cause and that the Court has entered its findings of fact, conclusions of law, memorandum of opinion, and judgment, simultaneously with the entry of this order;

It Is Hereby Ordered, Adjudged, and Decreed That:

1. Shoso Nii, on or before February 23, 1949, pay over to the Attorney General of the United States, as Successor to the Alien Property Custodian (or

his duly authorized representatives), the sum of Three Thousand One Hundred Sixty-nine and 01/100 Dollars (\$3,169.01) pursuant to Turnover Directive signed by the Attorney General of the United States on August 20, 1948, and served on Shoso Nii on August 30, 1948; and

2. That the said Shoso Nii shall, on or before February 23, 1949, account for and pay over to the Attorney General of the United States, as Successor to the Alien Property Custodian, or his duly authorized representatives, the net income from the vested real property involved in these proceedings for the period from May 1, 1935, to and including July 1, 1941.

/s/ J. FRANK McLAUGHLIN,
Judge, United States District Court for the Territory
of Hawaii.

Approved as to form:

.....,
Attorney for Shoso Nii.

/s/ LEON R. GROSS,
Attorneys for the Attorney General of the United
States, as Successor to the Alien Property
Custodian.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 26, 1949. [245]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Shoso Nii, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Judicial Circuit from the entire "Judgment Order" entered in this action on the 26th day of January, 1949, and from the "Order Directing Accounting and Payment under Section 17, Title 50 U.S.C.A., as amended" entered in this action on the 26th day of January, 1949.

Dated at Honolulu, T. H., this 23rd day of February, A.D. 1949.

SHOSO NII,

Plaintiff,

By /s/ SHIRO KASHIWA,

Attorney for Appellant.

[Endorsed]: Filed Feb. 23, 1949. [247]

[Title of District Court and Cause.]

COST AND SUPERSEDEAS BOND

Know All Men by These Presents:

That I, Shoso Nii, as principal, and Henry Jinichi Tsumoto, as surety, are held and firmly bound unto Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, defendant, in the sum of Seven Thousand Eight Hundred and No/100 Dollars (\$7,800.00); to which payment well and truly to be made we bind ourselves and our respective heirs, executors, administrators and assigns, jointly and severally, by these presents.

Signed and sealed with our seals and dated this 23rd day of February, 1949.

Whereas, Shoso Nii has prosecuted his appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment order and Order Directing Accounting and Payment under Section 17, Title 50, U. S. C. A., as amended, entered in this cause by the United States District Court for the Territory of Hawaii on the 26th day of January, 1949; [249]

Now, Therefore, the condition of this obligation is such that if the above-named plaintiff, principal herein, shall prosecute his appeal to effect and pay and satisfy in full the judgment order and the Order Directing Accounting and Payment under Section 17, Title 50, U. S. C. A., as amended, together with costs; interest and damages for delay if said appeal is dismissed or if the said judgment order and Order Directing Accounting and Payment under Section 17, Title 50, U. S. C. A., as amended, is affirmed and further pay and satisfy such modification of the Judgment Order and Order Directing Accounting and Payment aforementioned and such costs, interest and damages as the said United States Circuit Court of Appeals for the Ninth Circuit may adjudge and award, then this obligation to be void, otherwise to remain in full force and effect.

(Seal) /s/ SHOSO NII,
Principal.

(Seal) /s/ HENRY JINICHI TSUMOTO,
Surety.

Territory of Hawaii,
City and County of Honolulu—ss.

Henry Jinichi Tsumoto, being first duly sworn, on oath, deposes and says:

That he is the surety on the foregoing Cost and Supersedeas Bond; that he is a citizen of the United States of America; that he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii; that he is over 21 years of age; that he is not under guardianship; nor is he restrained or prevented from [250] dealing with his property by any legal proceedings; that he is the owner of unencumbered property situated in the Territory of Hawaii aforesaid which is subject to execution and worth more than double the amount of the penalty specified in the foregoing bond, over and above all debts, liabilities and obligations.

/s/ HENRY JINICHI TSUMOTO.

Subscribed and sworn to before me this 23rd day of February, A.D. 1949.

(Seal) /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires August 9, 1951.

APPROVAL OF BOND

The foregoing Cost and Supersedeas Bond is hereby approved.

Dated at Honolulu, T. H., this 23rd day of Feb.,
A.D. 1949.

/s/ J. FRANK McLAUGHLIN,
Judge of the United States District Court of the
Territory of Hawaii.

[Endorsed]: Filed Feb. 23, 1949. [251]

[Title of District Court and Cause.]

STAY OF JUDGMENT ORDER AND ORDER
DIRECTING ACCOUNTING AND PAY-
MENT UNDER SECTION 17, TITLE 50, U.
S. C. A., AS AMENDED

It Is Hereby Ordered that any and all payments
and any and all further proceeding required by the
Judgment Order and Order Directing Accounting
and Payment under Section 17, Title 50, U. S. C. A.,
as amended, is hereby stayed during the pendency
of the appeal entered in the above-entitled cause.

Dated at Honolulu, T. H., this 23rd day of Feb.,
A.D. 1949.

/s/ J. FRANK McLAUGHLIN,
Judge of the United States District Court of the
Territory of Hawaii.

[Endorsed]: Filed Feb. 23, 1949. [253]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss:

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings, exhibits, and transcript of proceedings of record in said cause:

Original Pleadings

Complaint and Summons.

Answer.

Answer to Counter-Claim.

Motion for Issuance of Commission to Take Deposition; Notice of Motion; and Affidavit of Shiro Kashiwa.

Order of Motion for Issuance of Commission to Take Deposition Appearance of Counsel.

Stipulation and Order for Pre-Trial Examination of Shoso Nii, Plaintiff.

Stipulation for Extension of Time for Filing Cross-Interrogatories on Behalf of Defendant Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian.

Notice of Motion for Summary Judgment.

Motion to Strike Affidavit of Leon R. Gross and Notice of Motion.

Motion for Summary Judgment.

Affidavit of Leon R. Gross in Support of Motion for Summary Judgment.

Affidavit of Albert K. Makinney.

Affidavit of Mark N. Huckestein. [270]

Motion to Strike Affidavits and Notice of Motion.

Request for Admission of Genuineness of Documents and Request for Admission of Facts Pursuant to Rule 36 of the Rules of Civil Procedure.

Affidavit of T. Ota in Support of Motion of Tom C. Clark for a Summary Judgment.

Admission of Facts and of Genuineness of Documents.

Counter Affidavit of Shoso Nii in Answer of Affidavit of T. Ota Filed in Support of the Motion of Tom C. Clark for Summary Judgment.

Petition of the Attorney General of the United States Pursuant to Section 17 of the Trading with the Enemy Act as Amended.

Amended Order and Rule to Show Cause.

United States Marshal's Return.

Answer to Petition of Attorney General under Section 17.

Oral Decision on the Petition of the Attorney General of the United States for the Entry of an Order under Section 17 of the Trading with the Enemy Act, as Amended, Directing Shoso Nii to Turn Over Forthwith the Property Vested under Vesting Order No. 9777.

Motion for Leave to File Amended Complaint.

Motion to Reopen Case to Take Additional Testimony.

Memorandum of Tom C. Clark, Attorney General of the United States, as Successor to the Alien Property Custodian, in Opposition to Motion to Reopen

Case to Take Additional Testimony, filed by Shoso Nii.

Motion for Findings of Facts.

Findings of Fact by the Court after a Trial of the Issues.

Conclusions of Law.

Opinion.

Judgment Order.

Order Directing Accounting and Payment under Section 17, Title 50, U. S. C. A., as Amended.

Notice of Appeal.

Cost and Supersedeas Bond.

Stay of Judgment Order and Order Directing Accounting and Payment under Section 17, Title 50, U.S.C.A., as Amended.

Statement of Points.

Designation of Record.

Designation of Record on Appeal by Defendant and Counter Plaintiff-Appellee.

Exhibits: Plaintiff's Exhibits A-1, A-2, B, C, D-1 to D-10, incl., E-1, E-2, L, M, N, O, and P. Plaintiff's Exhibits F, G, H, I, J, and K are attached to and are a part of the original Affidavit of Mark N. Huckestein listed above. United States Exhibits Nos. 1, 2A to 2M, incl., and 3-A to 3-E, incl.

Transcript of Proceedings: November 29, November 30, and December 1, 1948. [271]

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of March, A.D. 1949.

(Seal) /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of
Hawaii. [272]

In the United States District Court for the
Territory of Hawaii

Civil No. 837

SHOSO NII,

Plaintiff,

vs.

TOM C. CLARK, Attorney General, as Successor
to the Alien Property Custodian,
Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S.
District Court, Honolulu, T. H., on November 29,
1948,

Before Hon. J. Frank McLaughlin, Judge.

Appearances: Shiro Kashiwa, Esq., appearing for
the Plaintiff; Leon R. Gross, Esq., Manager, Of-
fice of Alien Property, Hawaii, appearing for the
Defendant; Howard K. Hoddick, Assistant United
States Attorney, appearing for the Defendant. [1*]

The Clerk: Civil No. 837, Shoso Nii versus Tom
C. Clark, for trial.

Mr. Kashiwa: Your Honor, at this time, to meet
this case, I am filing a motion for amended com-
plaint under Rule 15. I have served a copy on Mr.
Gross.

Mr. Gross: About two minutes ago, if the Court
please, Mr. Kashiwa handed me a sheaf of papers
which Mr. Hoddick is now in the process of look-

* Page numbering appearing at foot of page of original certified
Reporter's Transcript.

ing through. He stated he wanted to file a slightly amended complaint. I told him that the case was set for trial this morning at nine o'clock, that the matter was pending for eleven months, and I would object to the filing of any amended papers at this time.

The Court: What is the nature of this proposed amendment and why does it come at this late hour?

Mr. Kashiwa: As is true in all cases, before the trial of a case, if you look very closely into the facts—here you find facts, matters which should have been alleged in the original complaint. Now, your Honor, the difference in the complaint is, one is a difference in the price of the second piece of property involved, that is instead of a hundred dollars it is one hundred seventy-five dollars. And, secondly, the main change is with relation to the facts before the father left for Japan. And it is mainly some additions to paragraph five, your Honor. [1-a]

The Court: Well, presumably you knew all the facts when you filed the suit. It certainly comes late, two minutes before trial, that you seek to make these amendments. What is the reason for the fact that these alterations haven't been requested before?

Mr. Kashiwa: As stated in the affidavit, your Honor, the case involves facts about 20 years ago, 20 or more years ago, and it has been exceedingly difficult to get the facts situation. As far as the cause of action, it is not changed at all, your Honor.

The Court: The problem of proof, however, may be different. The situation, very plainly, is that the other side came to court to meet the petition as it stood previously.

Mr. Gross: If the Court please, Mr. Hoddick, who has been trying to read this 12-page pleading in three minutes,—now it is five minutes that we have had it—tells me that it is based on an entirely different theory and makes an effort to get around the law which we have previously propounded to this Court on the various preliminary motions. I'd like to request that the Court enter an order at this time denying leave to file this amended complaint on the grounds that it was not filed timely, that it endeavors to set up an entirely new theory, that the Plaintiff's Counsel has had ample time, that we have appeared before this Court on at least four different occasions on preliminary motions, and that the facts [2] which the Plaintiff's Counsel attempts to set up in this complaint at this time are facts which I would necessarily have to investigate, and that I certainly could not go to trial on a pleading that I had not had a chance to examine thoroughly and determine what kind of a reply pleading to make. And if Counsel is trying to stall for time—when he called me previously and asked for continuance in the case last week, I stated to him that if it met with the approval of the Court I had no objections to a continuance. That still stands. On the other hand, if the case is set for trial and Counsel proposes to go to trial, I would strenuously object to being compelled to go to trial on

a record which was not in proper order. There is an amended complaint and no answer. I would certainly not want my answer to the original complaint to stand as an answer to this complaint, particularly since Mr. Hoddick informs me that the complaint is drawn on an entirely different theory.

Rule 15, which Counsel refers to, says:

“A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party.” [3]

Mr. Kashiwa: May it please the Court, I'd like to present this case as thoroughly as possible. It is a vitally important case even as far as the law is concerned. Now, your Honor, if Counsel is going to stick to technicalities, I am right now notifying him that his answer—I know he is going to rely on the statute of frauds, your Honor—his answer filed in this case doesn't in any way refer to any statute of frauds. And under Rule 15 he must specifically notify, set up an affirmative defense on the statute of frauds. I am going to warn counsel ahead of time that there is such a rule, and if he is ever going to rely on it, if he is going to be technical now, I will stand on my technicalities, your Honor. I believe that that is the sole defense they have, your Honor. And it is my contention

that Counsel should not be heard at a later time, that the statute will be relied on as a defense. Rule 15 requires that they are affirmatively pleaded, and there is nothing in the answer affirmatively pleading the statute of frauds, your Honor.

Mr. Gross: I suggest that Counsel take care of his pleadings and we will take care of our pleadings. But I don't suggest that Counsel wait until two minutes before a case is set for trial and then file an amended complaint which is based on an entirely different theory and is a very subtle effort by the attorney for the Plaintiff to take this case out of the adjudicated decisions which he knows would compel [4] the Court to hold against him.

The Court: What is the different theory that you contend as spelled out by this proposed amended complaint?

Mr. Gross: If the Court please, from what Mr. Hoddick tells me, in a matter of eight or nine minutes one cannot possibly analyze the complaint, and Mr. Hoddick tells me that there is a great deal of material which may or may not be relevant which is alleged in this complaint, going back for years prior to the alleged gift here. This is a case, if the Court please, where we already have on file admitted facts, and in my opinion the record of this case is sufficient right now so that the Court without hearing one particle of testimony upon the admissions of facts which have been made by the Plaintiff could decide the issues without hearing any testimony whatsoever. And the Court indicated at the hearing on the motion for summary judg-

ment that justice is an excess of caution and that without any possible doubt the Plaintiff might claim that he had not had his day in court, that if the Plaintiff claimed such he would give the Plaintiff an opportunity to be heard further. But I believe that the Court indicated very strongly at that time that he felt that practically all of the facts which were germane to the issues here stood admitted on the record.

The Court: Well, I don't know whether this spells out a different theory on the cause of action or not. [5]

Mr. Gross: I don't either. But I certainly can't go to trial upon a complaint that was served on me ten minutes ago after the case had been pending for eleven months. I'd like to state further that the answer to the original complaint here was prepared in our office in Washington; it was not prepared here. And I would not take the responsibility of proceeding to trial on an amended complaint without certainly first an opportunity of having the same people in Washington who examined this complaint originally examine this amended complaint and determine whether they want to file a new answer. If Counsel wants to enter his motion for leave to file his complaint and continue it, continue his motion for leave to file, I have no objection to that. But obviously we can't go to trial this morning on that state of the record. I am prepared to proceed upon the record as it is now.

The Court: Do you want to say something?

Mr. Kashiwa: Your Honor, as far as I am

concerned I have stated in my motion that I am perfectly willing to grant Mr. Gross or his boss ample time to answer the amended complaint. I understand that it is discretionary with the Court.

The Court: Yes, but you have a very narrow area of discretion after they have reported here that this pleading has stood eleven months, and the case is set for trial and two minutes before the trial you seek to amend over the opposition [6] of the other side. It is a very, very narrow area of discretion.

Mr. Kashiwa: Your Honor, even after the proof is on, still amendments may be allowed, your Honor.

The Court: To conform to the proof.

Mr. Kashiwa: Yes.

The Court: But without changing the cause of action. Do you contend that this proposed amendment alters in any way the basic cause of action previously set forth?

Mr. Kashiwa: No, your Honor, it is the same. We contend that it was a gift.

The Court: Well, it looks to me as if you contend that your principle allegations of change are contained in paragraph five. It looks to me as if most of that is pleaded evidence which technically forms no part of the pleadings; it certainly doesn't conform to the basic rule of the Federal Civil Rules that the statement of the cause of action shall be a brief, concise and plain statement. It looks to me as if this amendment in paragraph five upon which you place the greatest reliance as containing the principle alterations of the complaint, to re-

peat, that what you are doing is that you are pleading your evidence, and the contention advanced by you that there is no change in the cause of action, believing that your paragraph five is simply allegations of evidence rather than essential allegations to state a cause of action, coming as [7] it does after all these preliminaries,—this file is now three inches thick—and two minutes before trial after eleven months, doesn't move me under Rule 15, particularly in view of the opposition, to grant your motion at this time. So I am going to deny it.

Mr. Kashiwa: Your Honor, may the amended pleading as recited in the motion, as attached to the motion——

The Court: The whole thing may become part of the file.

Mr. Kashiwa: Yes.

The Court: Very well. We are proceeding to trial as scheduled on the pleadings as they stood as of nine o'clock this morning and still stand.

Mr. Kashiwa: Ready for the Plaintiff, your Honor.

Mr. Gross: Ready for the Defendant.

The Court: Very well. Does the Plaintiff wish to make an opening statement?

Mr. Kashiwa: Your Honor, there are some witnesses in here on my side. I do not know whether there are any witnesses on the Government's side, but——

Mr. Gross: Do you want to make a motion to exclude your own witnesses?

Mr. Kashiwa: How about you?

Mr. Gross: I have no witnesses.

Mr. Kashiwa: You have no witnesses?

Mr. Gross: I will make a motion to exclude yours, if you [8] want me to assist you.

Mr. Kashiwa: That is not a motion for my——

Mr. Gross: Well, I will make a motion that all witnesses be excluded except one witness for each side.

The Court: Very well. All persons in the courtroom who intend to be witnesses, who are to be called as witnesses, save and except one to remain to assist the respective Counsel, will leave the courtroom.

Mr. Gross: The Plaintiff is also here. Does the ruling of the Court apply to him, that is, the Plaintiff and one witness?

The Court: No, a witness.

Mr. Gross: If the Court please, I assume that Counsel has responded in answer to the Court's question that he does not desire to make an opening statement.

The Court: I haven't heard him answer. I would expect an answer.

Mr. Kashiwa: Your Honor, I will make an opening statement. The property in question, as it now stands, is in Waipahu situated between the main highway and the old highway on a newly-put-in highway which was put in about 1940. And in 1932 Mr. Kaneichi Nii, who is the father of the Plaintiff in this case, bought the property under an agreement of sale, in December, 1932. By that I mean the early part, he bought it under

an agreement of sale, and then in December, 1932, he [9] got title to the property. He purchased other property in Waipahu at about the same time.

I will prove, your Honor, that the Plaintiff is the only son of Kaneichi Nii. Kaneichi Nii was a highly successful business man in Waipahu; that he in 1921 returned to Japan and——

The Court: “He” being what, the son?

Mr. Kashiwa: The father.

The Court: You will help me if you will add “father” and “son” because I can’t keep these names straight.

Mr. Kashiwa: The father returned to Japan in 1921 and built an immense home there for himself and acquired a lot of property in Japan. He came back after that and started another store, this being the present Nii store by the——

Mr. Gross: If the Court please, I hate to interrupt Counsel. I’d like to have this witness excluded while Counsel is making his opening statement. The witness is now sitting on the witness stand.

The Court: Overruled. Go ahead.

Mr. Kashiwa: And in 1921 the store which is now there, now owned by the Plaintiff, was started again. And in 1928 Shoso Nii just graduated from the elementary school at Waipahu, and he decided to go ahead with his studies, but that due to his father’s inducement not to go ahead with his studies—he, in fact, had registered for higher education at the Kalakaua Junior High School here to enter the ninth grade and thereafter [10] go

into college. At that time there was no ninth grade at Waipahu. He wanted to go through high school and to college; he wanted to be some sort of a doctor. But due to his father's inducement—and at about that time they lost their favorite salesman—the father induced, in fact, went ahead and bought this child who was about 16 or 15 a valuable automobile just to induce him to stay home and work at the store with no compensation or wages, on the promise that everything he had in Hawaii, when he left Hawaii for the mainland, will be his; and furthermore, if in case he died, everything will be his anyway, he being the sole son also.

I will show your Honor that there was even a will executed to carry out all the intentions.

And in 1933, after this, Nii worked in the store for about five years. Nii was then just over 20. The Plaintiff's son was just over 20, and the store was turned over by the father to the son by duly executed bill of sale. And from then on the father, who was ill at that time with high blood pressure, had all intentions of going to Japan as soon as the son was fully capable of handling the business. He had enough property to take care of him for the rest of his life.

The store was transferred, and from the very time the store was transferred—before that, I will go back. The store was transferred in 1933. In 1932, while the property was still under an agreement of sale, the property in dispute, many [11] improvements were made on the property so that

income could be increased, and the purpose of that was so that when the father returned to Japan and the son and his wife, whom he had just before gotten from Japan—and this was known as a matched marriage—the son and the new wife would be able to get along when these improvements were put on. And after the store was turned over the father gave the son—in fact, Mr. Nii, the son, collected all the rentals from the property, the property in question, and he paid everything, taxes, income taxes, gross income taxes, and rental property taxes. Those are matters of record which I will show your Honor. And he exercised everything that an owner should exercise of the property.

The father had no lawyer but he dealt with an accountant called Omurei, who was not an attorney. And there was full intention to turn everything over to the son. But suddenly the eldest sister of the son, his eldest daughter, who was then in Japan, got very ill and he, the father, and the mother, suddenly had to leave for Japan. And they thereafter did not come back to the Territory.

Now, I will show your Honor that there was a bill of sale made when the father went to Omurei, the accountant; he had that made. And the father told us that due to the fact that all the rentals were permitted to be collected after the father went back to Japan, that he, the Plaintiff, in fact thought [12] that everything had been changed to his name, the store with the sale, all the legal

papers thrown in there in the safe. And in about 1938 he first discovered that the land in question was not yet changed into his name. And so he had powers of attorney drawn and sent to Japan. The powers of attorney are in the record of this cause now.

Now, right through the period from 1935 to 1941 he did everything to show that he was the beneficial owner of the property, the owner of the property. Now, in 1941, he suddenly had to leave for Japan. That was in June. We will show by National Service records, that is, by Selective Service Records, why he had to leave, and permission was granted to the Plaintiff to leave the Territory by the Waipahu board, six months' leave. And he left for Japan as soon as he could. And as soon as he got there things got pretty bad. The freeze came in about August of that year. And he intended to come back very soon but at the time he wanted to come back he discovered that no boats were coming this way. That he was informed. We still have a letter which we will introduce in evidence to the effect that the last boat was available through the Philippines and then Shanghai, but there was no guarantee of ever getting to Hawaii. And he did not go on that trip, but we will show that he made every effort to get back to his lawful residence in the Territory of Hawaii.

And in 1947, the latter part of November, just a short [13] time prior to the filing of this suit, he returned to the Territory. I forgot to mention the fact that he was born at Waipahu.

The Court: Very well. Swear the witness.

HENRY JINICHI TSUMOTO,

a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

The Court: What is your name? State your name, age, residence, occupation and citizenship? Speak loud enough so everybody can hear you.

The Witness: Henry Jinichi Tsumoto.

The Court: How do you spell your middle name?

The Witness: J-i-n-i-c-h-i.

The Court: How old are you?

The Witness: Forty-eight.

The Court: Where do you live?

The Witness: 1350 Dillingham Boulevard.

The Court: What is your occupation?

The Witness: Lumber business.

The Court: What is the name of your business?

The Witness: Kalihi Lumber.

The Court: And of what country are you a citizen or subject? [14]

The Witness: American.

The Court: Exclusively? Only? Are you a citizen of the United States only?

The Witness: Yes.

The Court: Take the witness.

Mr. Gross: Is he a citizen of the United States?

The Court: Yes, he said he was, and only.

Mr. Kashiwa: Your Honor, at this time, in order to get over the first obstacle in this case, I'd like to offer in evidence—this has no connec-

(Testimony of Henry Jinichi Tsumoto.)

tion with this witness—if it weren't for this, there is no use of continuing this case, that is, that a claim was filed with the Office of the Alien Property Custodian in this case on December 2, 1947. I have shown Mr. Gross a copy of the letter.

Mr. Gross: He just showed it to me now. I am willing to admit this document in evidence without stipulating that it proves that the claim has been filed. It proves that he received a communication from our office; that any document purporting to be a claim—that the copy of the claim is not attached to the letter itself. If he would attach a copy of the claim to the letter, I would be willing to stipulate to that.

Mr. Kashiwa: I will. (Handing a document to Mr. Gross.)

Mr. Gross: Do you want these to be marked as Plaintiff's Exhibit 1 for identification? [15]

Mr. Kashiwa: Yes. Instead of the original of the letter going in, I have an exact typewritten copy of that. May I substitute this typewritten copy of the letter?

Mr. Gross: After we have had an opportunity to compare it, no objection to a substitute. I'd prefer a photostatic copy, if the Court please.

The Court: An accurate copy will do. The original may be marked and the copy of the claim as one exhibit. And you will have leave to withdraw the original, which apparently is a reply from the Alien Property Custodian, and substitute therefor an accurate copy.

(Testimony of Henry Jinichi Tsumoto.)

Mr. Kashiwa: Yes, your Honor.

The Court: And the same will be what, Mr. Clerk?

Mr. Kashiwa: At the same time I make a substitution.

The Court: Well, subject to check it may be substituted. But the original is the one that becomes marked. And the same becomes, Mr. Clerk——

The Clerk: Is this for identification or as an exhibit?

The Court: Received in evidence.

The Clerk: Plaintiff's Exhibit "A."

(The document referred to was received in evidence as "Plaintiff's Exhibit A.")

Mr. Gross: Mr. Kashiwa, do you think it would make for easier reference if we marked each one of these sheets "A-1," "A-2," "A-3," and so forth?

The Court: Apparently you are not familiar with my system. Nobody marks it except the Clerk. He is the one that has got to keep the record. And in the instance where you have a series of things, like 15 or 20 photographs, you can let us know in advance that you propose to offer a series, and then the Clerk will be prepared to give them a series marking. But the Clerk controls the marking. That is Exhibit "A"?

The Clerk: Yes, your Honor.

The Court: Have you labeled it one and one or two?

(Testimony of Henry Jinichi Tsumoto.)

The Clerk: I was just going to ask you if you want the reply letter to the claim——

The Court: I should think the copy of the claim should be “A-1” and the reply “A-2.”

The Clerk: I will so mark them.

The Court: All right.

(The documents previously marked and received as “Plaintiff’s Exhibit A” were remarked and received in evidence as “A-1” and “A-2.”)

[Printer’s Note: Plaintiff’s Exhibits A-1 and A-2 are set out in full at pages 402 to 409 of this printed Record.]

The Court: Is that clear to everyone now? Copy of the Plaintiff’s claim to the Alien Property Custodian is Exhibit “A-1,” and the Custodian’s reply is “A-2.” All right. Proceed.

Q. (By Mr. Kashiwa): Mr. Tsumoto, where were you born? [17] A. Kona, Hawaii.

Q. Did you ever live in Waipahu?

A. Yes.

Q. When did you move from Kona to Waipahu? A. A long time, six years old.

Q. What year were you born?

A. 1899.

Q. And six years after that you went to Waipahu? A. Yes.

Q. That is Waipahu of this Island?

A. Yes.

(Testimony of Henry Jinichi Tsumoto.)

Q. Since you moved to Waipahu when you were six years old, how long did you reside there?

A. After that I going—my mother is die and I going back with father to Japan, about six year, living in Japan and then come back again to Waipahu.

Q. How old were you when you went back to Japan?

Mr. Gross: If the Court please, I am sorry that I still haven't been able to get the witness' answer to the question. It was, how long did he live in Waipahu? I got when he went to Japan and he lived in Waipahu, but I don't understand what his answer is yet. I don't want to make a motion to strike. I'd just like to get the answer.

The Court: Well, all I know is that he was born in Kona, went when he was six years old to live in Waipahu, after which [18] time his mother died and he then went to Japan, went to Japan with his father for a time, returning to Waipahu. That's all he said so far.

Q. How old were you when your mother died?

A. Six years old.

Q. Your mother died when you were six years old?

A. Yes.

Q. That is when you came to Waipahu?

A. Yes.

Q. Is that the same year that you went back to Japan?

A. Yes.

Mr. Gross: If the Court please, I am afraid I am going to have to object to this entire line of

(Testimony of Henry Jinichi Tsumoto.)

questioning. I should like to state that as far as my understanding of the issues involved in this case is, they are as follows: that in 1947 the Office of Alien Property vested a piece of real estate; in the same year a suit was filed under Section 9 of the Trading With the Enemy Act claiming that the real estate did not belong to the vestee but belonged to the vestee's son, the Plaintiff. I cannot see the materiality or the relevancy or any other pertinency of a stranger to these proceedings testifying as to when his mother died, how long he lived in Waipahu, how they are related subjects.

The Court: Well, there is no relevancy except that it is background material. [19]

Mr. Kashiwa: That is all, your Honor, to show that he is familiar with the situation.

The Court: Proceed.

Q. You said that you went to Japan when you were six years old? A. Yes.

Q. Then when you moved from Kona to Waipahu, how long did you stay in Waipahu before going to Japan?

A. Just a couple of months, that's all. And then after 13 years old I come back from Japan and I live in Waipahu about 1921 or '22. I stay that long.

Q. You stayed in Waipahu up until 1921 or 1922? A. Yes.

Q. And then where did you go?

A. And then Honolulu.

(Testimony of Henry Jinichi Tsumoto.)

Q. And after 1921-'22 you have been in Honolulu continuously? A. Yes.

Q. How many times have you been married?

A. Twice.

Q. Who was your first wife?

A. Mr. Nii's sister.

Q. You mean Shoso Nii's?

A. Yes, Shoso Nii's sister.

Q. And whose daughter was she? [20]

A. Daughter of Kaneichi Nii.

Q. Now, when did you get married?

A. That I don't remember good, but I was about 22 years old.

Q. What was her name?

A. Jinichi Tsumoto.

Q. No, her name? A. Hatsuko Nii.

Q. How long did you live with Hatsuko Nii?

A. From the time to 1931 I live with her.

Q. What happened in 1931?

A. She was sick and go back to Japan.

Q. Did you go back with her? A. Yes.

Q. How long did you stay in Japan?

A. I stay about three months, two months, I think.

Q. And did she come back with you?

A. No, she stay all the time.

Q. Did you know Kaneichi Nii?

A. Yes.

The Court: That is the father?

Mr. Kashiwa: Yes.

(Testimony of Henry Jinichi Tsumoto.)

Q. Do you know how much education Shoso Nii had? A. Yes.

Q. What school? [21]

A. Just grammar school.

Q. What grammar school? A. Waipahu.

Q. Did he go to junior high school or high school?

A. Yes, he want to go but he asked——

Mr. Gross: Just a minute. I think the answer is not responsive to the question. The question was, did he go to junior high school, and the witness started to say, I think he wanted to go.

Mr. Kashiwa: You answer yes or no.

The Court: Do you understand the question?

The Witness: Yes.

The Court: All right. Just answer it and then explain it later if you need to explain it. The question, to repeat, as I understand it, is, did the Plaintiff Shoso Nii go to junior high school or high school here?

A. No.

Q. Do you know why? A. Yes.

Mr. Gross: I object to that question on the grounds that it is irrelevant.

The Court: Overruled.

Mr. Gross: And it calls for a conclusion. How can this witness state why this man Shoso Nii didn't go to high school? He may not have gone to high school for any number of reasons. [22]

The Court: He says he knows. He is testify-

(Testimony of Henry Jinichi Tsumoto.)

ing under oath. Proceed. The answer to the question was Yes.

Q. Why didn't he go to junior high school?

A. His father is very weak and he want to help him in store work.

Q. Now, after Shoso Nii graduated from elementary school in the eighth grade, what did Shoso Nii do? A. He helping in store.

Q. What store? A. His father's store.

Q. What was the name of that store?

A. Kaneichi Nii Store.

Q. And where was that store situated?

A. Middle of Waipahu City, Waipahu Town.

Q. Is the store in the same location now?

A. Yes.

Q. With relation to the plantation store, where is it? A. What means that?

Q. With relation to the Waipahu plantation store, where is the Kaneichi Nii Store?

A. You mean the location?

Q. Yes.

A. It is a couple hundred feet—no, a couple thousand feet away from the Waipahu store to the town side.

Q. Was it on the main highway there? [23]

A. Yes.

Q. Now, what hours was this store open from in the morning to night?

Mr. Gross: If the Court please, how can this witness testify of his own knowledge what hours the store was open unless he was personally there

(Testimony of Henry Jinichi Tsumoto.)

all the time? I have no objection to this background material but I think that we are just loading the record with a lot of material that does not bear on the issues of this case.

The Court: Well, his method of knowing, if he does know, is something you can test out on cross-examination. All the witnesses are presumed to answer as of their own knowledge,—and the witness is under oath—as of their own knowledge as to what they know. I presume when they answer the questions they profess to be claiming that they know what they are talking about. If they don't, I presume that they will answer that they don't know. So that you will have your right to cross-examine on that subject. And, therefore, the objection is overruled.

A. Open about six o'clock and about 11-12 o'clock, at night eleven o'clock, I think, sometimes about twelve o'clock late, because I not all the time there but once in a while I went there and look and see.

Mr. Gross: Now I make a motion to strike on the grounds of his own answer. He wasn't there all the time. He stated, [24] he went there once in a while to look-see.

The Court: Overruled.

Q. You said six o'clock in the morning?

A. Morning.

Q. Now, do you know the property which is involved in this case? A. Yes.

Q. Where is that situated?

(Testimony of Henry Jinichi Tsumoto.)

A. That is Waipahu, is in the middle of the town, Ewa side by the river.

Q. Is there a new highway at Waipahu now?

A. Yes.

Q. Now, with relation to the old highway and the new highway, where is this property?

A. Is between, between the new highway and old highway.

Q. Is there a road going between the two highways?

A. Not—yes, one side is the river and one side is the Waipahu river. I don't know what is the name but there is a river crossing there by the property.

Q. Would you go to the blackboard there and show us with relation to the two new highways where this property is? A. Yes.

Q. By a new highway I mean the Farrington Highway.

A. Yes. This is the new highway (indicating on blackboard) and this is the old highway. [25]

Q. All right. A. This is the new highway.

Q. Will you mark that "A"?

A. "A." That is new.

Q. Where is the old highway?

A. Old highway, this one. (Writing on blackboard.)

Q. What is this street over here?

A. This is Waipahu main street, old main street. That is Maunaloa Road.

Q. Will you mark that "C"? A. "C."

(Testimony of Henry Jinichi Tsumoto.)

Q. And you mentioned about a river. Where is the river? A. This is the river. (Indicating.)

Q. Is that the Waipahu River you mean?

A. Yes.

Q. Write "river" there. That's all. And that block you put there, that is the property?

A. Yes.

Q. All right. Now, you remember when Mr. Kaneichi Nii bought that property?

A. That I don't know, what time they bought it.

Q. But do you know of the fact that he did buy it? A. Yes, I know he buy it.

Q. Now, at the time he bought that property, there were houses on it? [26]

A. One house, I think.

Q. Now how many houses are there on that property?

A. I am not sure but about three or——

Q. All right. Did you have anything to do with the building of those other houses?

A. What is that?

Q. Did you have anything to do with the building of the other houses on the property?

A. Yes, I sell him his materials.

Q. You mentioned that you were a lumber man?

A. Yes.

Q. Were you in the business at that time?

A. At that time in lumber but not too much, just firewood and lumber.

Q. Now, at that time where was this lumber

(Testimony of Henry Jinichi Tsumoto.)

which was used to build these houses and which you sold to him obtained?

A. That is, the lumber is used lumber bought from Schofield.

Q. Who got it from Schofield?

A. Woolley Contractors.

Mr. Gross: May I repeat my objections to this entire line of questions, if the Court please? Where he acquired the lumber that he sold to Mr. Kaneichi Nii is, I think, pretty far afield from the issues of this law suit. I move to strike the testimony. [27]

The Court: Overruled.

Q. Now, were you ever paid for that lumber?

A. That is long time—rate I get from Shoso Nii—

Q. What year was that?

A. That was about three or four years later.

Q. Shoso Nii paid you?

A. Yes, he paid me.

Q. Do you know why Mr. Nii went back, Mr. Kaneichi Nee, the father, went back to Japan in 1935?

A. Yes.

Q. Why did he go back?

A. He was very weak and he got property in Japan. That is why.

Q. Was your wife in Japan? A. Yes.

Q. After 1935 when the father went back to Japan, who took care of that property near that Waipahu River?

A. Shoso Nii took care of that.

(Testimony of Henry Jinichi Tsumoto.)

Q. Do you know who collected the rentals for the property? A. Yes.

Q. Who did? A. Shoso——

Mr. Gross: If the Court please,— —

The Court: Wait a minute. [28]

Mr. Gross: I'd like to object to that. Counsel has not laid any foundation for this man to be able to testify that he knows who collected the rents for the property.

The Court: He asked him if he knew. He said Yes.

Mr. Gross: All right. I will withdraw that.

The Court: Repeat the question.

(The reporter read the last question.)

The Court: Answer the question.

A. Shoso Nii collected.

Mr. Kashiwa: No further questions.

The Court: Cross-examination?

Mr. Gross: If the Court please, for the purpose of the record I'd like to renew at this time my motion to strike all of the testimony of this witness on the grounds that it is incompetent, irrelevant and immaterial, particularly immaterial to the issues raised by the pleadings here.

The Court: That may be, but I presume it is going to be connected up on the theory that I don't know the whole case at the moment, and I can't see where it fits into the picture, but it may. I will deny the motion. You may renew it later if it appears more clearly on the whole picture before the Court as being irrelevant. Before the cross-examination, it

(Testimony of Henry Jinichi Tsumoto.)

is almost ten o'clock, and I will take a short recess.

(A short recess was taken at 10:00 a.m.)

After Recess. [29]

The Court: Cross-examination?

Cross-Examination

By Mr. Gross:

Q. Mr. Tsumoto, what is your relation to the Nii family again?

A. Nii, Nii's daughter is my wife, was before, the first wife is Nii's daughter.

Q. You mean Shoso Nii would then be your brother-in-law?

A. No. Shoso Nii is my wife's sister's brother.

Q. Your wife——

The Court: The first wife was the Plaintiff's sister.

Q. So at one time Shoso Nii was your brother-in-law, is that correct? A. Yes.

Q. How long have you known the Nii family?

A. A long time.

Q. You are good friends, aren't you?

A. Yes.

Q. When did you first hear about this law suit?

A. What is that?

Q. When did you first hear about this law suit?

A. I can't understand what you mean that.

Q. Your answer is you don't understand the question, is that it? [30] A. Yes.

(Testimony of Henry Jinichi Tsumoto.)

Q. Would you like to have the question repeated in Japanese? A. Yes.

The Court: It will not be allowed.

Mr. Gross: I submit, if the Court please, that the question does not require any high degree of comprehension. I'd like the Court to instruct the witness to answer the question.

The Court: Repeat the question to the witness.

(The reporter read the last question.)

The Court: Do you understand that question?

The Witness: No.

The Court: What is it about the question that you don't understand, is it the words "law suit"?

The Witness: Yes.

The Court: It is this case.

The Witness: 'Oh, case.

The Court: Now you understand that? It is this case. Can you answer the question? When did you first hear about this case?

The Witness: Here?

The Court: This case that is on trial now.

The Witness: A couple months ago.

Q. Who told you about the case?

A. Nii told me, Shoso Nii. [31]

Q. Have you discussed this case with Mr. Shiro Kashiwa?

The Court: What is the word that bothers you? Is it "discussed"?

The Witness: Disgusted?

(Testimony of Henry Jinichi Tsumoto.)

The Court: No, not "disgusted"; "discussed," talked to. Please make your question simpler.

Q. Your answer is that you have talked to Mr. Shiro Kashiwa about this case? A. Yes.

Q. When did you first talk to Mr. Shiro Kashiwa about this case? A. A couple months ago.

Q. How often did you talk to Mr. Shiro Kashiwa about this case?

A. That is hard to say because once in a while—see, not every time.

Q. Did you talk to Mr. Shiro Kashiwa about this case two times?

A. About two, three times.

Q. More than three times?

A. About, not more than three.

Q. Not more than three times? A. Yes.

Q. I call your attention to the diagram which you have drawn on the blackboard showing the location of the property [32] and ask you if you ever drew that diagram before?

A. I didn't draw before.

Q. Did Mr. Kashiwa draw that diagram for you?

A. No, I did that.

Q. This is the first time that you ever have drawn a diagram showing that property?

A. Yes, I know the property where is. I remember that.

Q. Then your answer is that this is the first time that you have ever drawn a diagram of the property, is that correct?

A. Yes, yes, is the first time.

(Testimony of Henry Jinichi Tsumoto.)

Q. How many years were you married to the sister of Shoso Nii, Hatsuko?

A. Nineteen, about. I was about 22 years old and then—about ten years, I think, ten or twelve years, I think. I don't remember good. Anyway, she going back in 1931 to Japan.

Q. Were any children born to you as the result of that marriage?

The Court: You understand that one, don't you? Did you have any children by your first wife?

The Witness: No, no children.

The Court: It is neither here nor there, but I have got to find out, to satisfy my own mind, were you divorced from your first wife or did she die?

Mr. Gross: She is still alive, the way I understand it.

The Court: Were you divorced from your first wife or did [33] she die?

The Witness: She not die but divorced.

The Court: All right.

Q. For the purpose of the record, when were you divorced?

A. Divorced in 1936, I think.

Q. In 1936? A. Yes.

Q. You stated on direct examination that you knew the store hours of the Nii store?

A. Yes.

Q. Were you always out there at the store during all of the time that it opened and closed?

A. No, once in a while I went to Waipahu, because next to this my father living, in store, too, so

(Testimony of Henry Jinichi Tsumoto.)

I was all the time there, not all the time but once in a while—see?

Q. By “once in a while” what do you mean?

A. Because father living next to his store, so I went up there, and my father living next to his store. The stores is close.

Q. What is the year in which you married Hatsuko Nii?

A. That, I forget that. I don’t remember that, what year.

Q. Try to give us your best recollection of your first marriage, the year. [34]

A. I was 22 at that time, that is why I—maybe 21 or 22. I no remember good that because matched marriage.

Q. Your answer is that you can’t remember the year in which you were married to Hatsuko, is that your answer?

A. Yes. I don’t know what year. I can’t remember that.

Q. How old was Shoso Nii at the time that you married Hatsuko?

A. Oh, at that time he was very young.

Q. How old, if you know?

A. About seven, eight years, I think.

Q. And how old was Shoso Nii when you and his sister were divorced?

A. That is 1936 I divorced. I don’t know what year, how old he was.

Q. What is your best estimate of Mr. Shoso Nii’s age at the time you divorced his sister?

(Testimony of Henry Jinichi Tsumoto.)

A. The age is—I don't know very sure but about——

Mr. Kashiwa: Your Honor, may the witness be instructed, if he wants to do so, to subtract and add, that he may do so?

The Court: Certainly. He doesn't need a pencil and piece of paper to do that subtracting. He is in the lumber business.

Mr. Kashiwa: Have you got a pencil?

The Witness: I don't know. [35]

The Court: Well, look—you were born in 1899; you said you were about 22 when you married the girl.

The Witness: Yes.

The Court: You were married for about ten years. You said that the son or the brother of the girl you married was seven or eight years old at the time you married the girl. The question is, how old was he when you were divorced?

The Witness: Just roughly he is about 22, I guess, that divorced——

Q. So Shoso Nii was 22 years old when you divorced his sister?

A. That's right. I'm not sure exactly the age, I'm not sure. I don't remember that.

Q. How long have you been in business?

A. Oh, about more than 20 years.

Q. You have been pretty successful at it, have you not? Have you been successful in the business?

The Court (to the witness): Don't look at me all

(Testimony of Henry Jinichi Tsumoto.)

the time. If you don't understand the question, ask him.

A. I don't understand that.

Q. You have to add figures in your business,

A. Oh, sometimes, sometimes not.

Q. You have to add figures in your business, don't you? Do you have to add figures in your business?

A. Yes, that's right. [36]

Q. Would you like to try to inform us, then exactly the dates that you married Hatsuko and when you were divorced and the ages, if you know, of the Plaintiff Shoso Nii when you married his sister and when you divorced his sister?

A. I can't remember that, what year married and what year divorced. The year I know but the divorce is maybe 1936, March, I think. I don't know.

Q. Did she divorce you or did you divorce her?

A. I divorce her.

Q. Where?

A. She living in Japan. I living here. She cannot come back.

Q. Where did you file your divorce in the case?

A. Here.

Q. Over here? A. Yes.

Q. Who was your lawyer?

A. The lawyer is—I forget the name. Kai, I guess—no, not Kai. I forget the name, the lawyer's name, I forget that.

Q. You testified that you knew why Kaneichi Nii went back to Japan. Will you state upon what

(Testimony of Henry Jinichi Tsumoto.)

you base your conclusion that you knew? Do you understand that question?

A. He is going back in 1935.

Q. Why did he go back? [37]

A. That I don't know.

Q. You testified that Kaneichi Nii had property in Japan? A. Yes.

Q. How do you know that?

A. I know, I hear from him all the time and I saw that when I go back at that time.

Q. What did you see?

A. His property, his property and house.

Q. How did you know it was his?

A. He—somebody told me.

Q. Who told you?

A. Japanese people taking care of his property. That's who told me.

Mr. Gross: If the Court please, I at this time would like to move to strike all of the direct testimony of this witness with reference to the ownership of property in Japan by Kaneichi Nii. It is obvious from his cross-examination that it is based purely on hearsay.

The Court: Oh, you are probably right, but it hasn't anything to do with this case, that the man has property in Japan. It is probably just general information picked up.

Mr. Gross: What is the ruling?

The Court: I am going to overrule it.

Q. You stated on direct examination that you sold some [38] old lumber? A. Yes.

(Testimony of Henry Jinichi Tsumoto.)

Q. With which to build those houses out there, is that correct? A. Yes.

Q. When, what year? A. 1932.

Q. What month in 1932?

A. Month, I don't know; I don't remember the month, but I know is 1932.

Q. How did you happen to know 1932 so well?

A. Just—going back to Japan with the wife in 1931, so next year. That's why I remember that.

Q. The year after you went back to Japan you came back here?

A. Came back here, and then I sold that.

Q. You sold what? A. The lumber.

Q. The lumber, is that correct? A. Yes.

Q. Have you examined your business records to find out what year it was that you sold this lumber?

A. No, I no examine.

Q. Do you know what year Mr. Kaneichi Nii bought this property? [39]

A. That I don't know.

Q. Didn't you testify on direct examination that you did know?

A. I don't know that, what year he bought it. Just roughly I know but I don't know exactly when he bought it. It is not mine—see?

The Court: He didn't so testify. He just said he bought it. He didn't say when, according to my notes.

Q. Do you know a man by the name of T. Ota?

A. Yes.

Q. How long have you known him?

(Testimony of Henry Jinichi Tsumoto.)

A. I know him a very long time.

Q. Have you discussed this case with him?

A. That I don't know.

Q. Did you understand the question?

A. You mean talk? No, I didn't talk with him with this case.

The Court: Did not?

The Witness: Not.

Q. Do you know a gentleman by the name of Mikami? A. What is that?

Q. Do you know a man by the name of Mikami?

A. Mikami?

Q. Yes. A. Which Mikami? [40]

Q. Katsutoshi Mikami. A. Yes.

Q. How long have you known him?

A. A long time.

Q. He was a member of the family, too, wasn't he? A. Yes.

Q. Do you know him very well? A. Yes.

Q. Did he know anything about this property?

A. I don't know that. Maybe he know.

Q. When is the last time that you talked to Mr. Shiro Kashiwa about this case?

A. Last time just today.

Q. What did he tell you?

A. He didn't say anything, just when we come in court, that's all.

Q. When was the time before today that you talked with Mr. Shiro Kashiwa about this case?

A. Yesterday. No, I mean Saturday.

Q. What did he say at that time?

(Testimony of Henry Jinichi Tsumoto.)

A. He said the court opens Monday so go up there, that's all.

Q. And when was the time before last Saturday that you talked to Mr. Shiro Kashiwa about this case?

A. That we don't talk. Just—— [41]

Q. Would you answer that question, please?

The Court: Complete your answer or answer the question again.

A. You mean just the last time?

The Court: No, the question was, when was the time before last Saturday?

A. That, I don't remember that. I don't remember that.

Q. Where did you talk to him?

The Court: Which time?

Q. At the time before last Saturday?

A. He telephone to me that the case open Monday. That's all. And then I didn't go to his office before that time.

Q. Have you ever been to Mr. Shiro Kashiwa's office?

A. In different case, different things, I ask something, but not this case.

Q. Was Mr. Shiro Kashiwa your attorney?

A. Yes.

Q. He represents you in other matters, is that correct?

A. Yes.

Mr. Gross: That's all.

The Court: Redirect?

Redirect Examination

By Mr. Kashiwa:

Q. You said you went to Japan, took your wife

(Testimony of Henry Jinichi Tsumoto.)

back there in 1931. How long were you in Japan?

A. Two months.

Q. And you came back to Hawaii?

A. Yes.

Q. That was in 1931? A. Yes.

Q. Do you know what day Shoso was born, the day and year?

A. I don't know good but the year is 1915, January 3rd. I know is the date exactly—

Q. Is that January 3rd?

A. Yes, Shoso Nii is the same.

Q. Why did you take your wife back to Japan?

A. She was sick all that time.

Q. What kind of illness?

A. All kinds sick but no good weather here in this country.

Mr. Gross: Sorry, I didn't get that.

The Court: The weather in this country was no good for her.

Mr. Kashiwa: No further questions.

The Court: All right. Any further questions? You are excused.

(Witness excused.)

The Court: Next witness.

Mr. Kashiwa: Your Honor, at this time there is a deposition [43] to be filed. (Showing a sealed envelope.)

The Court: The Clerk may break the seal. (Clerk breaks seal and opens envelope.) This is the deposition of the father taken in Japan before an American Consul in a large sealed envelope addressed to

the Clerk. It contains a smaller envelope. Now, the big one has been opened. And the title of the case appears on the front and it is addressed as Deposition of Kaneichi Nii taken before Jack J. H. Oldham, Vice Consul of the United States of America in Kobe, Japan. And it is to the Clerk of the United States District Court for the Territory of Hawaii. And on the back it is sealed and it states "Depositions taken before me and sealed up, addressed, and transmitted by me, being deposited in the APO 317, Kobe, Japan, this 19th day of October, 1948. Jack J. H. Oldham, Vice Consul of the United States of America in and for Kobe, Japan, acting as Commissioner." You may open that. (Clerk opens smaller envelope.) From it you take some papers, legal size; one is the commission and the other is the deposition of the father and his answers to the interrogatories propounded. I notice the father's signature and fingerprint on each page, as well as the signature of the interpreter. I will return them or hand them over, rather, to the parties—at the end there is the usual Consular certificate.

Mr. Kashiwa: Will the Clerk read the questions and answers? [44]

The Court: No. You read, one of you read the questions and the other one read the answers, and the reporter can get them.

Mr. Gross: If the Court please, may I at this time examine it?

The Court: Both of you.

Mr. Gross: Before we proceed.

The Court: Certainly. Examine it only as to form now. You will be concerned with the answers to the

questions later perhaps. I would suggest that one attorney read the questions and the other the answers so it can get into the record properly. Which do you want to read, Mr. Kashiwa?

Mr. Kashiwa: May I just look through this? I have never done this. That is, I read the questions and counsel read the answers?

The Court: Either way.

Mr. Gross: You read the questions and I will read the answers. I think it will simplify it.

Mr. Kashiwa: It is stipulated that I read the questions and counsel, Mr. Gross, read the answers.

The Court: Read the whole deposition from the beginning.

Mr. Kashiwa: "Deposition of Kaneichi Nii Taken on Behalf of Plaintiff.

"The Foreign Service of the United States of America, Japan, City of Kobe, American Consular Service. [45]

"Kaneichi Nii, of 125 Kono Mura, Saiki Gun, Hiroshima Ken, Japan, residing more than one hundred miles from the place where the trial of this action will occur, a witness called on behalf of the plaintiff herein, being duly cautioned and sworn to testify the whole truth, and being carefully examined, deposes and says as follows:

"It appearing that the witness, Kaneichi Nii, could not understand the English language, and did well understand the Japanese language, One Morishige Hirayama, who also well understands said Japanese language, was employer as interpreter and was sworn as follows: 'You do solemnly swear that you know the English and Japanese languages and

that you will truly and impartially interpret the answers of the said Kaneichi Nii thereto, out of the Japanese language into the English language.' and said Morishige Hirayama interpreted accordingly."

The Court: It doesn't say anything about translating the English questions. It is a peculiar interpreter's oath. Go ahead.

Mr. Kashiwa: (Continuing):

"In the United States District Court
For the Territory of Hawaii

Civil No. 837

SHOSO NII,

Plaintiff,

vs.

TOM C. CLARK, Attorney General [46] as Successor to the Alien Property Custodian,

Defendant.

"INTERROGATORIES TO BE PROPOUNDED
TO KANEICHI NII

"1. Q. What is your name?"

Mr. Gross: At this time I want to object to the entire deposition on the grounds that the certification does not state that the questions were translated from English into Japanese to the witness and that his answers were translated from Japanese into English, or that it appears that the interpreter was an unbiased or impartial individual.

Mr. Kashiwa: That is not all of this. On the next page the questions are——

The Court: I will reserve ruling on that until we come to the end.

Mr. Kashiwa: Your Honor, it does show that the questions were asked by another party.

The Court: Oh.

Mr. Kashiwa: I will read that, your Honor, subsequently.

“It appearing that the witness Kaneichi Nii, could not read the English language, and did well understand the Japanese language, One Florence Nii, who well reads the English language, and who also well understands the Japanese language, was employed to translate the written interrogatories propounded to Kaneichi Nii, and the answers to said interrogatories and cross-interrogatories under oath, which had been reduced to [47] writing, for the examination of the witness, and was sworn as follows: ‘You do solemnly swear that you know and read the English and Japanese languages and that you will truly and impartially translate the oath and interrogatories that have been administered to Kaneichi Nii, the witness that has been examined, out of the English language into the Japanese language, such that the witness may examine same and acknowledge same as his true and correct answers,’ and said Florence Nii translated accordingly, and the said Kaneichi Nii, acknowledged the answers, as reduced to writing, as his true and correct answers.”

The Court: Very well. It appears to be an approved system now. Go ahead.

(Mr. Kashiwa read the questions and Mr. Gross read the answers of the deposition as follows:)

"1. Q. What is your name?

A. Kaneichi Nii.

"2. Q. Where do you reside?

A. 1/942 Kono-mura, Saiki-gun, Hiroshima, Japan.

"3. Q. Are you the father of Shoso Nii who now resides at Waipahu, Oahu, Territory of Hawaii, United States of America? A. Yes.

"4. Q. How old are you now? [48]

A. 71 (Seventy-one) years old.

"5. Q. At what age did you go to Hawaii for the first time?

A. 30 (Thirty) years of age.

"6. Q. How many years did you spend in Hawaii?

A. 26 (Twenty-six) years, but during that time I returned to Japan twice.

"7. Q. When did you last come back from Hawaii to Japan? A. May, 1935.

"8. Q. At the time you last came back from Hawaii to Japan how many children did you have?

A. 3 (Three), 1 (One) son and 2 (Two) daughters.

"9. Q. Will you name your children who are now living and give their present addresses?

A. Shoso Nii—Waipahu, Hawaii. Hatsuko Kodama—Kono-mura, Saiki-gun, Hiroshima-ken, Japan. Florence Nii—CCD, District No. 2, APO 25, c/o P.M., San Francisco, Cal. (Osaka, Japan)."

The Court: What is all that?

Mr. Kashiwa: That is the military address.

Mr. Gross: Military address.

(Continuation.)

“10. Q. When you last came back from Hawaii [49] to Japan, did you transfer the Nii Store to your son Shoso Nii?”

Mr. Gross: Now, I am going to object to the answer of that question on the grounds that the answer here is contrary to the record. It calls for a conclusion of the witness and it is irrelevant.

The Court: Overruled.

(Continuation.)

“A. Yes.

“11. Q. If you did transfer the store, did you sign a bill of sale?”

Mr. Gross: I object to the next answer on the same grounds. I object to the answer to the next question.

The Court: Let me get the question again.

“11. Q. If you did transfer the store, did you sign a bill of sale?”

Mr. Gross: There is a bill of sale in the record here, and it is a leading question.

The Court: Overruled.

“A. Verbally transferred—I did not make any document.

“12. Q. Just prior to your last departure from Hawaii to Japan, did you own any real properties in Hawaii?”

Mr. Gross: I object to that question on the grounds that it is a leading question. [50]

The Court: Overruled.

“A. Yes, land, about $\frac{3}{4}$ (Three-quarters) of an acre.

“13. Q. What did you do with all of your real

properties in Hawaii when you last left Hawaii for Japan?"

Mr. Gross: I am going to object to the next question on the grounds that it calls for the conclusion of the witness.

The Court: What he did with his property before leaving for Japan?

Mr. Gross: Yes. And that it is irrelevant.

The Court: Overruled.

"A. After returning to Japan, I made a power of attorney to Shoso Nii at the American Consulate in Kobe about December, 1935, to dispose of my properties in Hawaii.

"14. Q. When you last returned to Japan from Hawaii, did you have properties in Japan?"

Mr. Gross: I am going to object to that question on the grounds that it calls for a conclusion of the witness and that that is not the best evidence of his ownership of property there.

The Court: Well, the last objection may be technical a bit but I am going to overrule it.

"A. Yes.

"15. Q. At that time about how much was such property in Japan together with what you brought back from [51] Hawaii on your last trip worth in Japanese yen?"

Mr. Gross: I will object to that on the grounds that it is irrelevant.

The Court: What is the relevancy?

Mr. Kashiwa: Your Honor, our contention is that there was a gift made. Now, nobody who is destitute would make a gift. But here he had sufficient property

in Japan to take care of him. The purpose of offering the proof is to show that he had plenty to live on.

The Court: I have a hazy recollection that previously that has been conceded. My recollection is that some time during the many arguments we have had that it had been conceded. Isn't that right?

Mr. Gross: What has been conceded?

The Court: That he had sufficient property in Japan.

Mr. Gross: That has not.

The Court: It has not?

Mr. Gross: No.

The Court: If I did hear it, it was by way of argument?

Mr. Gross: Yes.

The Court: I am going to allow the answer to the question.

"A. About 100,000 (one hundred thousand) yen, 1935 valuation.

"16. Q. Was that sufficient to comfortably take [52] care of you and your wife for the rest of your life and your wife's life?"

Mr. Gross: I object to that question on the ground that it is irrelevant and it calls—it is a question which the witness cannot properly answer.

The Court: Well, yes.

Mr. Gross: It calls for——

The Court: ——his conjecture or opinion as of that date.

Mr. Gross: It is a conjectural statement.

The Court: However, it may reflect on the state of mind. If it is clear that the statement relates to

his opinion as of the date he went there, not his opinion today.

Mr. Kashiwa: I will read the prior question and answer.

The Court: Perhaps constructing them together you may tie it in.

Mr. Kashiwa: I will read the prior question, question 14.

"14. Q. When you last returned to Japan from Hawaii, did you have properties in Japan?"

A. Yes.

"15. Q. At that time about how much was such property in Japan together with what you brought back from Hawaii on your last trip worth in Japanese yen?"

A. About 100,000 (one hundred thousand) yen, 1935 valuation. [53]

"16. Q. Was that sufficient to comfortably take care of you and your wife for the rest of your life and your wife's life?"

The Court: I will take it that he means as of that date. The question may be answered.

"A. Yes. Sufficient.

"17. Q. When you last left Hawaii for Japan was your daughter Hatsuko ill? A. Yes."

Mr. Gross: I repeat that I consider that irrelevant and I'd like to preserve the objection. The answer to the question is "Yes".

"18. Q. Where was Satsuko living at that time?"

Mr. Gross: Same objection, as irrelevant.

The Court: Same ruling.

"A. In my house, Kono-mura, Saiki-gun, Hiroshima Ken, Japan."

Mr. Kashiwa: Certified by the Consul.

The Court: What is the page you just flipped?

Mr. Gross: That's the one we just read before, stating the method.

Mr. Kashiwa: U. S. District Court of the Territory of Hawaii, Shoso Nii, Plaintiff, versus Tom Clark, Defendant, Civil No. 837.

The Court: What is that coming up now? [54]

Mr. Kashiwa: The certificate.

The Court: Oh.

Mr. Kashiwa: Certificate by Consul of the United States of America, Foreign Service of the United States of America. I will read this.

“In the United States District Court
For the Territory of Hawaii

Civil No. 837

“SHOSO NII,

Plaintiff,

vs.

“TOM C. CLARK, Attorney General as Successor
to the Alien Property Custodian,

Defendant.

“CERTIFICATE BY CONSUL OF THE
UNITED STATES OF AMERICA

“The Foreign Service of the United States of
America,
Japan, City of Kobe,
American Consular Service—ss.

“I hereby certify that on the 14th day of October,
1948, before me, Vice Consul of the United States

of America, at my office, 24 Kyo-machi, Kobe, Japan, personally appeared, pursuant to the notice hereto annexed, between the hours of 9:00 o'clock a.m. and 11:00 o'clock a.m., Kaneichi Nii, the witness named in said notice, and the said Kaneichi Nii being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as in [55] the foregoing annexed deposition set out.

"I further certify that said deposition was begun on the 14th day of October, 1948, and continued from day to day until the 14th day of October, 1948, when same was completed.

"I further certify that the said deposition was then and there reduced to typewriting by me, and was, after it had been reduced to typewriting, subscribed by the witness, and the same has been retained by me for the purpose of sealing up and directing the same to the clerk of the court as required by law.

"I further certify that the reason why the said deposition was taken was that the said witness resides at 125 Kono Mura, Saiki Gun, Hiroshima Ken, Japan, more than one hundred miles from Honolulu, Territory of Hawaii, the place where this cause is to be tried.

"I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause.

"I further certify that the fee for taking said deposition, \$10.00, has been paid to me by Florence Nii on behalf of the plaintiff, and the same is just and reasonable.

“Witness my hand and official seal at American Consular Service, Kobe, Japan, this 18th day of October, 1948.

/s/ JACK J. H. OLDHAM,
Vice Consul of the United States [56] of America
in and for Kobe, Japan.

Service No. 2427; fee \$10.00; Item No. 32.”

And it is stamped “American Consular Service.”

There is a seal on this one.

The Court: In a pretty red ribbon.

Mr. Kashiwa: This is the notice—

“American Consular Service
Tokyo Bank Building
(South Entrance)
24 Kyomachi, Kobe

September 30, 1948

“Mr. Kaneichi Nii
125 Kono-mura, Saiki-gun
Hiroshima-ken

“Sir:

“This office is in receipt of a commission to take a deposition from you, dated May 21, 1948, in a matter pending before the United States District Court, District of Hawaii, Honolulu, T. H., and entitled ‘Civil No. 837, Shoso Nii vs. Tom C. Clark, et cetera.’

“In order that this deposition may be taken, your presence will be required in Kobe. It is suggested

that you appear during the second week in October at this office, which is open from 8:00 a.m. until 4:30 p.m., Mondays through Fridays of each week. Please advise by return mail the date on which you expect to appear for the purpose of making this deposition.

“Very truly yours,

/s/ DOUGLAS JENKINS, JR.,
American Consul.”

The Court: Very well.

Mr. Gross: Now I'd like to make another and further objection to the entire deposition on the grounds that it appears from the deposition itself that the witness was interrogated by Florence Nii who was his daughter.

The Court: How do you know that?

Mr. Gross: It appears from the deposition.

The Court: Let's see that.

Mr. Gross: His answer to the question at the bottom of page one as to who his children were.

The Court: How do you know it is the same Florence Nii?

Mr. Gross: Because the certificate shows it.

Mr. Kashiwa: We admit that.

The Court: What difference does it make if she took an oath to do the interpreting correctly?

Mr. Gross: The questions are being propounded by the man's own daughter to him from English into Japanese, where innuendos of translation may be very important as we have had it in this case.

The Court: Well, granted, but she has given the

American Consul her oath that she did this translating properly. If you wish to impeach her, you will have to bring forth further [58] evidence to do it. But as it stands, I will not entertain your objection.

Mr. Gross: The objection will be overruled?

The Court: Yes.

Mr. Kashiwa: Your Honor, this commission is the record of this court——

The Court: Right.

Mr. Kashiwa: And I offer the entire deposition in the record.

The Court: It has already been read into the record, but to illustrate as a means of double checking the record, it may be marked by the clerk as an exhibit.

The Clerk: Plaintiff's Exhibit "B".

(The documents referred to were received in evidence as Plaintiff's Exhibit "B".)

The Court: There were no cross-interrogatories propounded to this witness, so there are none available to be read. It is eleven o'clock and I will take the second recess.

Mr. Gross: Might we ask the Court what its intention is, whether we are going through the afternoon?

The Court: Yes. And, therefore, we will stop at noon for our noon recess.

(A short recess was taken at 11:00 a.m.)

After Recess

(Jack Nakagawa was sworn to act as interpreter.) [59]

EISUKE IKINAGA,

a witness on behalf of the plaintiff, being duly sworn through the interpreter, testified as follows:

Direct Examination

The Court: I want to first make sure that this man doesn't speak English. And you (to the interpreter) stay out of the picture until I am satisfied that he doesn't speak English. Will you please state your name, age, residence, occupation and citizenship? Wait a minute. He just sat there. He didn't indicate one way or another. Don't you speak English?

The Witness: (In English.) I speak some but I can't understand.

The Court: You would rather testify through an interpreter?

The Court: All right. (Through the interpreter.) Name, age, residence, occupation and citizenship?

The Witness: Eisuke Ikinaga.

Mr. Gross: Excuse me, isn't that Akini?

Mr. Kashiwa: I-k-e-n-a-g-a.

The Witness: I-k-i. I am 62 years old.

The Court: Residence?

The Witness: I live at Waipahu.

The Court: Occupation?

The Witness: I have a business of auto repairing and [60] selling autos.

The Court: And citizenship?

(Testimony of Eisuke Ikinaga.)

The Witness: I am a subject of Japan.

The Court: Take the witness.

By Mr. Kashiwa:

Q. How long have you resided in Waipahu?

A. Approximately 35 years.

Q. Continuously? A. Yes, continuously.

Q. What is the name of your business?

A. Waipahu Garage, Limited.

Q. During your stay in Waipahu for 35 years, did you know Kaneichi Nii? A. Yes.

Q. In what business was he in?

A. At first he had a grocery store. Then he went to Japan. He came back and is now engaged in his present business.

Q. Mr. Interpreter, I don't believe you got that right. Now engaged in.

A. In 1921 or '22 he sold his business and went back to Japan. And I don't know exactly when he came back, but after he came back he was engaged in the present business.

Q. Where is Kaneichi Nii now?

A. He is in Japan now. [61]

Q. Since when has he been in Japan?

A. I cannot recall exactly but I think it was about 1935 or '36.

Q. Do you know Shoso Nii? A. Yes.

Q. Is he in this courtroom?

A. Yes. He is sitting over there.

Q. Indicating the plaintiff sitting next to me.

The Court: Yes.

Q. How long have you known Shoso Nii?

(Testimony of Eisuke Ikinaga.)

A. He was born in Waipahu and I had known him ever since his birth.

Q. Did you know Shoso's mother?

A. Yes.

Q. Was Kaneichi Nii in any way connected with your business?

Mr. Gross: Objected to as a leading question.

The Court: Sustained.

Q. Did you have any business dealings with Mr. Kaneichi Nii?

A. Yes. He and I started, organized the Waipahu Garage.

Q. It was back when?

Mr. Gross: Objected to on the grounds that it is a leading question.

The Court: "When"? [62]

Mr. Gross: I withdraw the objection.

A. I cannot remember the exact date, but it was some time during the latter part of 1916 or the early part of 1917.

Q. You testified that Mr. Nii went back to Japan, Mr. Kaneichi Nii went back to Japan in 1935. At that time did you know what properties he had?

Mr. Gross: I object to this, to that question, unless counsel can by some other question show that this man was in a position to know what properties a total stranger had. I don't believe this is the best evidence of what properties Mr. Kaneichi Nii had, and I object to it on the grounds it is hearsay.

Mr. Kashiwa: Your Honor, I just asked him whether he knows, yes or no.

Mr. Gross: I object to the question, does he know?

(Testimony of Eisuke Ikinaga.)

The Court: All right.

A. Yes, I know.

Q. How far was your garage from the Kaneichi store?

Mr. Gross: Objected to as being irrelevant.

The Court: What is the point, to find out what the store hours were?

Mr. Kashiwa: No, your Honor, he says he knows, and I want to substantiate that. He is very close, so that they saw each other quite often. [63]

The Court: All right. Go ahead.

Mr. Kashiwa: I offer to prove that, your Honor.

A. About 50 or 60 feet away.

Q. Was it on the same street? A. Yes.

Q. Now, prior to Mr. Kaneichi Nii's departure to Japan, how often did you see him?

A. Inasmuch as we were friends and we lived in the same neighborhood, I used to see him quite frequently, not every day but quite frequently.

Q. Now, prior to Mr. Kaneichi Nii's departure to Japan, did you have any conversation with him regarding his properties here?

A. He did not tell me in detail about his property but the only thing that he said——

Mr. Gross: I object to anything further than that, if he had any conversation. Now, the witness testified that he did not tell him the details of selling his property. This is all a conversation between this witness and the man who is not before the court. And I'd like to make a further objection that it is hearsay and not the best evidence.

Mr. Kashiwa: Your Honor, this is certainly not

(Testimony of Eisuke Ikinaga.)

hearsay. The property in question they contend was owned by Kaneichi Nii, and any statements made by him, statements which in any way are against his interests, or any person who is a [64] prior owner of the property making statements with relation to that property at that time, your Honor, I contend is not hearsay. I am talking with the very person through whom they claim title.

The Court: Who is not a party to this action. This isn't an admission against interest. His father is not a party to this action.

Mr. Kashiwa: Yes, your Honor, but a grantor—this is not a case of a grantor-grantee. While the grantor is the owner of the land, if he makes any statement with relation to the property——

The Court: Not any; some statement.

Mr. Kashiwa: Yes. That is a statement that is admissible and is an exception to the hearsay rule.

The Court: As to boundaries of the property, and so forth, yes, but apparently what you are asking this man to testify to is what the father of this plaintiff told this man in general what he was going to do with his property when he went to Japan. Isn't that what you are driving at? Isn't that what you expect this witness to testify to?

Mr. Kashiwa: Yes, your Honor. Now, I submit that that is admissible in evidence, your Honor. He is a prior holder of the interest, the very interest they claimed they vested. And his statements are admissible.

Mr. Gross: Excuse me, Mr. Kashiwa, who is the prior [65] holder?

(Testimony of Eisuke Ikinaga.)

Mr. Kashiwa: Kaneichi Nii.

Mr. Gross: I thought you meant this witness. He was not only a prior holder; he was a direct holder of the title at the time of vesting.

The Court: You are both talking about the same thing?

Mr. Gross: That's right.

Mr. Kashiwa: I don't claim that he was.

The Court: In other words, your theory is that since the Government claims the father is the owner of the property that any statements the father may have made with respect to what he was going to do with the property is admissible as an exception to the hearsay rule under the theory that anything a landowner says about his property is admissible?

Mr. Kashiwa: Yes, your Honor.

The Court: I can't see that. The cases you point out of the grantor-grantee making general statements as to boundaries, and so forth, they do come under an exception to the hearsay rule. But I can't conceive of any exception to the hearsay rule that would allow a third person to testify in this particular kind of a case as to what a person said that he was going to do with the property.

Mr. Kashiwa: A third person—you mean Kaneichi Nii?

The Court: The man who the plaintiff here claims to be the grantor of that which he is claiming. [66]

Mr. Kashiwa: Your Honor, I intend to prove—this is an offer of proof—I intend to prove that the witness—not the witness—that Kaneichi Nii said

(Testimony of Eisuke Ikinaga.)

that he was going to give that property, the property in dispute in this case, to his son.

Mr. Gross: It is our contention that such a statement would be irrelevant. A man makes a lot of statements in the course of what he intends to do, and he changes his mind frequently.

Mr. Kashiwa: And we will follow that with proof, that there was a gift of that particular parcel made.

The Court: Well, your whole theory of the case is that it is a gift?

Mr. Kashiwa: Yes.

The Court: If you are endeavoring to show the state of mind of the alleged donor, I can't see anything to the objection of having this witness indicate what the donor indicated to him in a conversation as to what his intentions were. Now, what his intentions were and what he actually did may be two different things. But there is a difference——

Mr. Kashiwa: I will withdraw the question, your Honor. And may that last answer be stricken?

The Court: All right. It may go out.

Q. Now, do you know that piece of property Mr. Kaneichi Nii bought from Mr. Ota situated at Waipahu near the Waipahu River while Mr. Kaneichi Nii was here? [67] A. Yes, I do.

Q. Prior to Mr. Kaneichi Nii's departure to Japan in 1935 did he express his intentions as to what he was going to do with that property to you?

Mr. Gross: This is objected to on the grounds that it is irrelevant. A man's expression of intention to people who are not parties to the lawsuit is certainly not only irrelevant but it is not the best evi-

(Testimony of Eisuke Ikinaga.)

dence. It has no bearing on the issues here and it is a violation of the hearsay rule. Mr. Kashiwa is now going to try to come in through the back door when the Court won't let him come in through the front door. That is my feeling about it. And in addition to that, the question is vague and indefinite and uncertain. He hasn't fixed the time or the place or the hour. I think that the Government is entitled to be able to cross-examine this man if he should make such a statement as that. We don't know when this statement was made, who was present, or anything about it.

Mr. Kashiwa: Those matters will be developed later, your Honor.

The Court: You are obviously following up the suggestion that I made that the question in the state of mind of the donor may become of importance, but here you are endeavoring to get the recollection of his state of mind by virtue of what he may have said to this man at some time in the indefinite [68] past. Assuming for the moment that it is definite——

Mr. Kashiwa: Read that question back.

(The reporter read the last question.)

The Court: I don't think so. It seems to me to be hearsay. I am going to sustain the objection.

Q. Prior to Mr. Kaneichi Nii's departure for Japan in 1935 did you know what Mr. Kaneichi Nii intended to do with the property in question in this case?

Mr. Gross: Objected to on the grounds of incompetency. This witness is certainly not competent

(Testimony of Eisuke Ikinaga.)

to testify as to the state of mind of Mr. Kaneichi Nii who is now in Japan. Counsel took interrogatories from Mr. Nii in Japan, and if he wished to do so he could have examined Mr. Nii himself personally with reference to what his state of mind was. I certainly can't see how a third party, a person not a party to the lawsuit who has no financial interest in it, and who is, let us say, either a business or a social acquaintance, can testify as to what the state of mind of the Court may have been or the state of mind of counsel may have been, or any other person.

Mr. Kashiwa: I am just asking for an answer, yes or no; did he know or did he not know?

Mr. Gross: And I submit that he is incompetent to testify as to what the state of mind of a person now in Japan was in 1935. [69]

The Court: I think the objection is good. It is sustained.

Q. Do you know whether or not Mr. Shoso Nii went to high school?

A. I don't think he did.

Q. Where did he work, that is, after he finished his elementary school?

Mr. Gross: Objected to on the grounds that this is a double question. He assumes that he worked after he finished elementary school.

The Court: Sustained. It assumes that he also went to elementary school. Let's take it by stages.

Q. Did Shoso Nii go to Waipahu elementary school? A. Yes.

Q. Did he graduate from that?

(Testimony of Eisuke Ikinaga.)

A. I think he did.

Q. Now, what was the highest grade at Waipahu elementary school at that time?

A. Eighth grade.

Q. What did Shoso Nii do after that?

A. He was helping his father at his store.

Q. Now, on or about that time did the Niis buy any automobile from you?

Mr. Gross: Objected to as irrelevant, if the Court please. I don't think it makes any difference whether he says on or [70] about that time. I object to the form of the question. It is vague, indefinite, uncertain, and I object to the substance of the question on the grounds that it is immaterial whether the Niis—there are any number of Niis—he doesn't state what Nii bought what automobile and when. And on the further grounds—and I think it is a basic objection—that I'd like to continue with reference to all of this testimony, that it is irrelevant to the issues before the Court.

The Court: Well, having heard counsel's opening statement, he may be able to tie it up. But I do think that it could be more specific as to who you are talking about. The question is objectionable as not being definite enough.

Q. All right. After Shoso graduated from the elementary school, did Mr. Kaneichi Nii buy an automobile from you?

A. Yes. He said that he was going to get—

Mr. Gross: Just a minute. I object to what he said.

The Court: Mr. Interpreter, just let him answer

(Testimony of Eisuke Ikinaga.)

the question. Did he or did he not buy an automobile from this witness at about the time mentioned?

The Interpreter: The answer was "Yes".

Q. What kind of car was it?

A. It was a Chrysler.

Q. And whose name was it put——

Mr. Gross: Just a minute. I object. May the record show my objections to the relevancy of this entire line [71] of testimony will be taken to all of these questions having to do with anything——

The Court: Your objection of relevancy runs to the line and all this is admitted conditionally on being connected up.

Mr. Gross: And if counsel is endeavoring to prove by this question a question of title to an automobile, I want to submit the further objection that this is not the best evidence of title to the automobile. A certified copy of the record and the proper official will show in whose name title of the automobile was taken.

The Court: I think that is probably true. But I am not going to go off on that detail at the moment. If it becomes material, then I will.

A. I do not recollect clearly as to whose name it was bought under.

Q. Now, when Mr. Kaneichi Nii left for Japan in 1945——

The Court: '45?

Q. ——'35, did he tell you what he had done with this property which he had bought from Mr. Ota?

Mr. Gross: Objected to for the same reasons that I have previously expressed with reference to——

(Testimony of Eisuke Ikinaga.)

The Court: Sustained.

Mr. Kashiwa: Your Honor, I will offer to prove that, by this question, that there will be proof produced that the owner of the property at that time made a gift of the property [72] to Shoso Nii. Now, that is very material in this case, your Honor.

The Court: The facts are important. But what this witness could tell us what the man said he was going to do is not important. What he did do is important.

Mr. Kashiwa: That is the question. That is why I am reframing, coming back to the same thing.

The Court: Read the question again.

(The reporter read the last question.)

The Court: All right. You are correct on the question so far as what he did do being important. But what he did do as a fact which can stand on its own two feet as distinguished from this man telling us what he, what his father said he did do, what was done as a fact—what are those facts, not what this man heard the father say he did do? You go ahead and complete your offer.

Mr. Kashiwa: Your Honor, my position is this, that the A.P.C. now claim that they hold—they claim it through Nii—a vesting order. Now, they still claim that Kaneichi Nii to the date of the vesting order owned that property. Now, in that period of time—if there is any statement made by him showing that he does not have the title, your Honor, he does not own the land, I think that is admissible. It certainly is most material for a person who the other side

(Testimony of Eisuke Ikinaga.)

assumes that he owns the land if the person tells somebody that he doesn't [73] own the land, and certainly that testimony is admissible, your Honor.

The Court: It would be if the father were here. The father is not the plaintiff. Your man is contending that he owns the property, and it is incumbent upon him to show on what theory he does own the property.

Mr. Kashiwa: Your Honor, it is almost 12 o'clock. I am sure on this point—this is an exception to the hearsay rule, where an owner of a piece of property makes a statement——

The Court: Declaration against interest.

Mr. Kashiwa: Yes, your Honor.

The Court: And you will find in those cases that the party, the person who so declares, is the party to the lawsuit.

Mr. Kashiwa: Then why talk about hearsay? Why talk about exception to the hearsay rule? Because if the party is a party to the suit, it is not hearsay at all. There is no question. Why do the courts discuss this thing? It is because the party is not a party to the lawsuit. But yet he made that statement. That is why we talk about hearsay. If the party is a party to this suit, my gosh, we won't have to even talk about hearsay because any statement by any party to the suit is not hearsay.

The Court: I think you are right.

Mr. Gross: If the Court please, this is not a question [74] by which Mr. Kashiwa is endeavoring to prove that a statement was made. If that were what he was trying to prove and with proper ques-

(Testimony of Eisuke Ikinaga.)

tions would fix the time and the place and the date and who was present, I would agree that such statement might be admitted for what it was worth.

The Court: Statement by the father as to what he did.

Mr. Gross: No, what the father told this man at a certain time and place, so that it won't be vague and indefinite and uncertain as it is now. But that is not what Mr. Kashiwa is endeavoring to prove. He is trying to prove the ultimate fact, which is quite a different situation. And the Court's initial ruling on this question of hearsay I am sure is sound. It is pretty close to adjournment time, and I am perfectly willing during the lunch hour to endeavor to get cases, if the Court has any serious doubt as to the soundness of this ruling.

Mr. Kashiwa: I am calling for the very thing I am asking in that question. It is a statement.

The Court: Well, you go back to the question. I sustained the objection to your question. Now you are making an offer of proof and keep going back to the question. Give me a clear-cut offer of what you intend to prove by this witness.

Mr. Kashiwa: That Kaneichi Nii told him that everything he has in Hawaii he has given to his son, including this real property, and that he is going back to Japan. And Mr. and Mrs. Kaneichi Nii—I mean Shoso Nii—are still young people, [75] so please look after them when they need any help.

The Court: All right. Assuming that the witness would so testify, what would it prove?

(Testimony of Eisuke Ikinaga.)

Mr. Kashiwa: That he gave everything, including this real property in dispute, to his son.

Mr. Gross: That is where the issue is drawn.

The Court: That which you just said doesn't tend to prove that.

Mr. Kashiwa: The statement is, your Honor, that Kaneichi Nii gave everything he had in the Territory—Kaneichi said that to this witness—everything he had in Hawaii he gave to his son, so please look after the son.

The Court: Well, you have changed your offer. Your first offer was that the man would testify that father said he is leaving, and now you say he has left.

Mr. Kashiwa: No, no. He is leaving for Japan, that he has turned over everything to the son.

The Court: That isn't what you first said. I will ask you to repeat your offer. Now, what is it you are going to offer by this witness clearly? Don't shift it.

Mr. Kashiwa: I will offer to prove, your Honor, that at Waipahu in the year 1935, before Mr. Kaneichi Nii's departure for Japan—which I will later prove was on or about May, 1935—prior to such departure Kaneichi Nii made a statement to this witness that he is going back to Japan, that he has made, he [76] has transferred, given all of the property to his son, all of what he has in the Territory, including real estate and the store; and that he asked his good friend, the witness here, to look after the young couple, Mr. and Mrs. Shoso Nii.

The Court: All right.

Mr. Gross: I object to that on the grounds that

(Testimony of Eisuke Ikinaga.)

it is not the best evidence among other things, and the objections which I previously raised, and it is a violation of the hearsay rule. If the offer of proof is that he gave everything to his son, then the best evidence that he gave everything to his son is not this unsupported testimony of a conversation between a man who is not before the Court and cannot be cross-examined and who is still alive and whose interrogatories were taken before the Consul in Japan with great trouble and expense and who could have been asked to corroborate this testimony here. The Government has no way of cross-examining this man on this type of testimony.

The Court: Well, very definitely getting over this point that did bother me about parties, which I am now satisfied about, this plaintiff claims the land through this man, the father, and if the father had made a declaration of this sort definitely it would have been against his interest to say that somebody else now owns by reason of the gift that which I formerly claimed to own. The important thing that I want to find out is whether or not in point of fact he has made a gift, [77] not what he told somebody else, not what he told somebody else what he did do. That is the thing that bothers me.

Mr. Kashiwa: Whether he has?

The Court: Well, whatever the property involved is, the fact of the gift is important.

Mr. Kashiwa: I am endeavoring to prove this by evidence of this nature. This is not conclusive but evidence to be considered. It is material to that extent.

(Testimony of Eisuke Ikinaga.)

The Court: The fact that I tell somebody I have made a gift to my daughter, for example, of anything doesn't prove that I have made it.

Mr. Kashiwa: Yes, your Honor, but subsequently I will produce additional testimony, and I offer to prove, your Honor, the transaction between the father and son with the son's understanding. And not only that, but after the father went back, the ownership of this property the son exercised, and that is not by parol but by actual records; that he did everything that an owner of the property is to do, collect that rent, paid the taxes on it in his name, not in the father's name, paid the real property tax, made improvements out there.

The Court: We will get to that later. One thing at a time. I am more interested in this point now. How do you explain that you didn't ask the father about this in his deposition?

Mr. Kashiwa: I did, your Honor, but—let's see the [78] deposition. There is a question—

The Court: He said he made a verbal gift.

Mr. Gross: Only with reference to the store.

The Court: That's right.

Mr. Gross: And the bill of sale of the store is a part of the record here.

The Court: I remember catching that fact as it was read.

Mr. Kashiwa: Your Honor, here it says:

“Q. Just prior to your last departure from Hawaii to Japan, did you own any real properties in Hawaii?

(Testimony of Eisuke Ikinaga.)

“A. Yes, land, about $\frac{3}{4}$ (Three-quarters) of an acre.”

The Court: Yes.

Mr. Kashiwa: Question No. 13:

“Q. What did you do with all of your real properties in Hawaii when you left Hawaii for Japan?”

The Court: What is the answer?

Mr. Kashiwa: “Answer. After returning to Japan, I made a power of attorney to Shoso Nii at the American Consulate in Kobe about December, 1935, to dispose of my properties in Hawaii.”

The Court: Well, those are the ultimate facts that I am more interested in than what he may have told this witness he did. On the strength of that man's testimony the father, as I recall it—he testified in that deposition that prior [79] to going to Japan he made a verbal gift of the store to the son. Then this question that you read and his answer indicate that as to the real property, at some later date after he got to Japan, he gave the son certain powers of attorney to dispose of the real property. Now, whether the son used those powers of attorney or not I don't know at the moment. But that would be a fact certainly more substantial than having this witness tell me what the man told him he had done, when on the fact of that deposition he hadn't done something.

Mr. Kashiwa: Your Honor, on the face of this deposition—for example, your Honor knows of a fact that there was a bill of sale.

The Court: I seem to recall there was one.

Mr. Kashiwa: This is it. Now, certainly there is

(Testimony of Eisuke Ikinaga.)

something wrong with this witness here—he did make it, and, your Honor, from the very face of the deposition, from the actual physical evidence here in court, which your Honor has considered on a prior motion that that thing is vitally wrong——

The Court: Well, he is your witness. You put him on. You vouched for him.

Mr. Kashiwa: So I am intending to explain this, your Honor, by other evidence. The answer is not very definite what he did with the property. He says he later set a power of attorney——

Mr. Gross: If the Court please, if Mr. Kashiwa is trying [80] to impeach his own witness at this time, I am certainly going to object on the entire line of questioning at this time. He has no right to impeach his own witness.

The Court: Well, I am interested in this offer of proof. We got off on that. But I wanted to know why he hadn't covered the point, why he hadn't the alleged grantor testifying.

Mr. Kashiwa: In other words, I did cover the point but the answer wasn't exactly responsive. I tried to make the questions as comprehensive as possible, but the difficulty in getting a deposition is just what happened in this case.

The Court: Well, it is 12 o'clock. Let me see some of these authorities that you offered. And we will resume at 1:45.

Mr. Gross: If the Court please, I wonder if the Government might impose on the Court's indulgence. Mr. Hoddick has another matter, I believe.

Mr. Hoddick: It is before Judge Metzger at two

(Testimony of Eisuke Ikinaga.)

o'clock. We have a hearing set for trial and review of a sentence. It shouldn't probably take more than a half hour at the outside.

The Court: When was that set?

Mr. Hoddick: At two o'clock.

The Court: When was it set?

The Clerk: Last week, your Honor.

Mr. Hoddick: We filed a motion to set five days ago.

The Court: Can you advance it or is it set for two?

The Clerk: It is set for two, your Honor. There is only one setting for two o'clock, and Judge Metzger had it go on from this morning, a review of a sentence.

Mr. Hoddick: During the lunch hour I might be able to arrange for somebody else to go there in my stead.

The Court: Well, I haven't been thinking so much of that as I have been of the reporter problem. I'd be perfectly willing to excuse you. Small matters take at least a half hour, so that 2:30 or a quarter of three would be the earliest that we could get together on this matter. I think the best thing to do is to continue this until tomorrow morning. What is the situation tomorrow?

The Clerk: There is a hearing and two motions tomorrow morning at ten o'clock, your Honor. Those are pre-trial matters.

The Court: Have you made any effort to get another reporter?

The Clerk: For tomorrow?

(Testimony of Eisuke Ikinaga.)

The Court: For any time where there is a conflict?

The Clerk: There wouldn't be any conflict.

The Court: Why not? You've got a conflict. Well, I am going to continue this case until 1:30, and during the recess of the noon period endeavor to get another reporter for Judge Metzger's division, if you can. And in any event, if it is impossible, I will take a recess at two in order to [82] divide the reporter so that he can be in the other division. But if you are going to have these conflicts continually, as you well know, Mr. Clerk, I am not trying to have you do the impossible but frequently nobody thinks of it in advance and maybe that is the reason we can't get a second reporter as a substitute. Let's see if we can line up a substitute.

(The Court recessed at 12:00 noon.) [83]

Afternoon Session

The Court: Very well, gentlemen, I will call the case for the Clerk. It is the same case we had this morning, and the question before the Court is the ruling on the pending offer of proof. What have you to add to the picture, Mr. Kashiwa?

Mr. Kashiwa: I looked at your Honor's book. I think you have the same book as I have.

The Court: I've got two here, one on gifts and one on evidence.

Mr. Kashiwa: Page 516. I have 20, statement of former owner.

(Testimony of Eisuke Ikinaga.)

The Court: Yes.

Mr. Kashiwa: Declaration of the former owner in the nature of an admission against interest—

The Court: Well, I had about reached the same conclusion by a different process of reasoning, however. Your whole theory is one of gift.

Mr. Kashiwa: Yes.

The Court: And we went around in circles this morning about what the father may have said to this witness about his intention to make a gift. And on the question of whether an actual gift has been made or not, subsequent declarations by a donor are admissible as declarations against interest. So that on the gift side I would be inclined to think that if [84] it is shown that the gift has been made, then declarations by the father, if they be such and properly identified as to time and place, and so forth, would be admissible as declarations against interest. On the other hand, with respect to the property, you can reach the same conclusion as indicated by the citation to which you invited my attention, particularly when you realize, as you have claimed,—which I didn't fully appreciate this morning—that the Alien Property Custodian's title, if it has one, is no better than what the father had as of the date of the vesting. So I am going to accept your offer to prove that which you outlined when I last asked you to clearly make your offer and make it specific. So that you may proceed. I think it would be better to restate it. I sustained the objection to the last question. Maybe, in view of my present acceptance

(Testimony of Eisuke Ikinaga.)

of your offer, you might want to go back to that point and start over again. But I think in view of the confusion this morning that it would be highly beneficial to all to start over on this particular point.

Mr. Kashiwa: Now, your Honor, one point there.

The Court: Yes?

Mr. Kashiwa: Your Honor made a differentiation between a statement made, statements made prior to the completion of the gift and after the completion of the gift.

The Court: As to gifts, it is the subsequent declarations that are important. As to the property here, we have a little [85] combination of circumstances, and I am inclined to believe that declarations against interest by one when he owns the property, has reason to speak about it, are binding on one who claims in the chain of title under that. So you may have two different grounds here. I don't know——

Mr. Gross: If the Court please, I'd like to point out that there is one other thing on that exception to the hearsay rule that I believe is accepted, namely, that if it is offered to prove the statement of a witness by another witness, there must be some showing that the witness whose hearsay we are going to let in is unavailable. The record here shows that Mr. Kaneichi Nii is not unavailable, that as late as October, 1948, his testimony was taken before an American Consul in Japan. I think that is a modification of this rule.

The Court: Well, that is perhaps something that

(Testimony of Eisuke Ikinaga.)

we may have to attend to. At the moment all that I would care to say on that point without a clear ruling being made—for there is nothing before the Court—is that I'd be inclined to think that that circumstance might go to the weight rather than to the admissibility.

Mr. Kashiwa: Your Honor, under the statement on former owner, even if the witness is right here we can introduce——

The Court: Well, go ahead.

By Mr. Kashiwa:

Q. Now, prior to May, 1935, when Mr. Kaneichi Nii [86] departed for the Empire of Japan, did you have any conversation with him as to what he did with his properties in Hawaii?

Mr. Gross: Objected to as being leading. I will withdraw the objection.

The Court: All right.

A. Yes, I had.

Q. And what was that?

Mr. Gross: If the Court please, now I am going to object to it unless Counsel will fix the time and place and date and who were present so that it will be possible to——

The Court: If anyone were present.

Mr. Gross: That's right, if anyone were present.

By Mr. Kashiwa:

Q. Was there anyone present at the time of that conversation? A. I do not remember.

Q. Where was this conversation had?

(Testimony of Eisuke Ikinaga.)

A. After he had definitely decided to return to Japan, he came to me at my garage.

Q. Where was that garage?

A. Waipahu Garage.

Q. With relation to the time Mr. Nii went back to Japan, about how many days or months prior to that was it?

A. I do not recollect exactly but the conversation took place after he had definitely decided to return, and that the [87] baggage and personal belongings were being crated up, which was presumably about three or four days prior to the sailing.

Q. Now, what was the conversation?

A. He told me that he had definitely decided to return to Japan and that all the properties he had in Hawaii he was going to give to Mr. Shoso, his son, and told me that inasmuch as Shoso was a young man for me to look after them as though I were in his place.

Q. Now, aside from that conversation, did you at any time prior to that time, between the day Mr. Ota sold the property to the day he left for Japan, have any other conversation with Mr. Kaneichi Nii with regard to the disposition of his property in Japan?

A. Yes, at another time he told me that he had decided to give everything over to his son and that he talked about signing some papers. I am not very clear as to the details of the conversation.

The Court: Let's go back.

Mr. Kashiwa: Read the last question back.

(Testimony of Eisuke Ikinaga.)

Mr. Gross: I make a motion to strike the whole answer.

The Court: It may go out. Read the question, to the attorney rather than the witness.

(The reporter read the last question.)

Mr. Kashiwa: I will withdraw that question. That answer may be stricken. [88]

Q. Now, aside from that conversation which you referred to which you had when Mr. Kaneichi Nii was making his baggage, preparing to go to Japan, from the time he purchased the T. Ota property up to the time of that conversation, did you have any other conversation with relation to the disposition of property which Kaneichi Nii held here in the Territory of Hawaii?

A. Between the time he had frequently told me that the property was to be for Shoso, and I presumed that Mr. Nii, Kaneichi Nii, had signed some property in relation to turning over the properties to Shoso.

Mr. Gross: I move to strike what he presumed, what the witness presumed.

The Court: It may go out.

Mr. Kashiwa: The last presumption part?

The Court: Yes.

Mr. Kashiwa: Do you want to examine this before I show it to him? (Handing several sheets of paper to Mr. Gross.)

Q. Let me show you this document which purports to be the last will and testament of Kaneichi

(Testimony of Eisuke Ikinaga.)

Nii. Look at the second page of this document and see if your signature is on it?

A. Yes, this is my signature.

Q. Does the signature of Kaneichi Nii appear on it?

Mr. Gross: I wonder if we might have this document [89] identified at this time?

A. Yes, I am positive that is Mr. Nii's signature.

Mr. Kashiwa: Counsel wants this identified. May this be marked for identification?

The Court: Yes. The document may be marked.

The Clerk: Plaintiff's Exhibit No. 1 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Q. Now, after seeing this document, do you recall having signed it? A. Yes, I have.

Q. On December 17, 1932, when you were residing on Waipahu? A. Yes.

Q. Now, you said that Kaneichi Nii's signature appears on this document on page 2. There are two signatures written in Japanese. Which signature written in Japanese is Kaneichi Nii's?

Mr. Gross: If the Court please, I object to Counsel examining this witness on a document that hasn't even been offered in evidence yet, at length. If he is trying to lay a foundation, that is one thing, but I gather from what he is going to do is to offer a copy of Kaneichi Nii's last will and testament into evidence.

(Testimony of Eisuke Ikinaga.)

The Court: All the witness was asked to do is to indicate [90] which Japanese signature he has previously identified as the father's signature. The objection is overruled.

A. The one on top here is Mr. Nii's.

Q. The one towards the top of the page?

A. Yes.

The Court: That is the top of the second page of that document?

Mr. Kashiwa: Yes.

Q. Now, whose signature is that written in Japanese characters towards the center of the page?

A. This signature is that of Mr. Tomejiro Tsutomoto, Mr. Nii's brother-in-law.

Mr. Kashiwa: I offer this in evidence.

The Court: On what theory?

Mr. Gross: I object to this offer.

The Court: What are your objections and what is the theory on which it is offered first?

Mr. Kashiwa: Your Honor, to show intention that everything he had, as is drawn in accordance with the laws of the Territory of Hawaii, he gives to his son.

The Court: Well, just offhand my reaction to it is that it purports to be a last will and testament, and nobody has told this Court yet that the man is dead. At most this could only be a reflection of his intention as of the day he did it. The next day he may have revoked it. [91]

Mr. Kashiwa: Your Honor, in these cases—I

(Testimony of Eisuke Ikinaga.)

have looked it up, and, of course, I know Counsel is later going to come up with a defense——

The Court: The man isn't dead, is he?

Mr. Kashiwa: No. Counsel is later going to come up with a defense of the statute of frauds, your Honor. Now, it is my contention that Mr. Kaneichi Nii—as I stated in my opening statement, when Shoso Nii finished the elementary school, he wanted to go to high school, and instead of his going to high school the father promised him if he stayed that all of his property in Hawaii, if he left Hawaii or if he died, would be his. And this is in part performance of that agreement. And the statute of frauds provides that there should be some memorandum, and a will has been held to be a sufficient memorandum. I have cases on that point, your Honor.

The Court: A man has to be dead first before the will is effective.

Mr. Kashiwa: Yes, your Honor. But I will offer to prove, your Honor, that there was an agreement to make this gift. Now, in these cases where there is a promise, or in this case an additional promise that when he leaves the Territory, your Honor, he will give everything he has at that time to his son—now, there is some question, your Honor, as to whether the real property is involved in that agreement. Your Honor is familiar with the statute of frauds of the Territory of Hawaii. [92] I am speaking of a defense; I don't know whether Counsel will interpose it, that this is purely parol, your Honor, and that the statute of frauds stands in between.

(Testimony of Eisuke Ikinaga.)

The Court: We will come to that, no doubt. But what do you contend this proves?

Mr. Kashiwa: There are thousands of cases of this nature, where a man promises to devise a piece of property to so and so, if this child remains on a farm and works, and the child actually worked for so many years; and there is at a later time a will executed granting the property to the son. In most of the cases, your Honor, that will is subsequently changed. All right. If they get hold of that first will, even though it is executed 'way after the time of the making of the promise, the statute of frauds requires some sort of a memorandum, if you are familiar with the wording of our statute. Unless there is some memorandum—and the courts have held sustaining those, that is, where a will has been offered in evidence, a will signed by the owner of the land. Then, your Honor, the courts have held that a will which is a signed memorandum, signed by the party, that it is a memorandum, a signed memorandum, your Honor. We are not proving the will, your Honor, not in any sense of the word, but as a memorandum, just like a piece of paper which he signed, even if that will was not properly executed—there are many cases in which a will was not properly executed, and then the question came [93] into court. Even though it is not properly executed, as long as there is a signature on the bottom of it, that he promised to devise, it is binding, because the written memorandum takes it out of the statute of

(Testimony of Eisuke Ikinaga.)

frauds. The written memorandum in a case of that nature is a defective will.

The Court: Well, on your theory—I see what you are driving at—but on your theory this memorandum says, if I have anything when I die, which I haven't previously given away, then all the rest that remains of the estate, real, personal, mixed, whatsoever and wheresoever situated of which I may be possessed, of which I may be entitled at the time of my decease, I give to the Plaintiff.

Mr. Kashiwa: Your Honor, in every will that is a presumption.

The Court: I understand that. But you are claiming it is a memorandum of a present gift, are you not?

Mr. Kashiwa: No, your Honor. My contention is that it is a memorandum in 1928 when this child wanted to go to college and be educated, and certain representations were made to this child, your Honor, and in reliance on that he did not take the advantages; he stayed home and worked for the old man on a promise, your Honor, that——

The Court: That his father would do something.

Mr. Kashiwa: ——that he, the father, will will everything to him, that is, if he dies everything would go to him; whereas, [94] if he left Hawaii everything would be his.

The Court: Yes.

Mr. Kashiwa: And relying on that promise, this boy stayed for years in the store and gave up the best portion of his life while he should have been in

(Testimony of Eisuke Ikinaga.)

high school and college. And, your Honor, it is my contention that to prove that promise, that is, a promise to devise land or to give land if he leaves Hawaii, it is my contention to prove that promise. Now, in order to sustain that promise—it is a promise to convey a piece of real property, to give a piece of real property, transfer the title, whatever may be the contingency—in order to do that, your Honor, my contention is that under the statute of frauds, which I am expecting Counsel to bring up, your Honor, there must be a memorandum. This case is very similar, your Honor, to the Shipman case in 26 Hawaii.

The Court: It is very novel. Well, I have got to take a recess. It is two o'clock. I will hear your objection after the recess.

(A recess was taken at 2:00 o'clock.)

After Recess

The Court: Mr. Kashiwa, I have looked during the recess at the Shipman case. There the man had died and the will was an effective instrument.

Mr. Kashiwa: But there are cases in which the man doesn't die but where the party performs his part of the agreement, [95] the party relying on the promise to such an extent that even if he does not die still the equitable interest is enforceable.

The Court: I'd like to see those, because at most it would seem to me that this would tend to prove simply that on this particular date it was the man's intention to do something about his property effective when he died. Now, further,—I repeat with

(Testimony of Eisuke Ikinaga.)

emphasis—you have talked about some promise that the father allegedly made to sign, to leave the property if he went to Japan or if he died, of which this memorandum, as you claim, is enough to take that oral promise out of the statute of frauds. But I repeat again, I have heard you talk about it but I haven't heard any witness talk about it.

Mr. Kashiwa: I offered to prove that by the Plaintiff.

The Court: But at best this offer is premature.

Mr. Kashiwa: May it be marked for identification at the present time?

The Court: It has been.

Mr. Kashiwa: He has testified as to the signature.

The Court: It has been marked for identification as exhibit—

The Clerk: Plaintiff's 1 for identification.

Mr. Kashiwa: I have an exact reproduction of that will, your Honor. May this be substituted for the original will, [96] your Honor?

The Court: Yes.

Mr. Gross: Neither one of them is in evidence yet. Until such time as the Court admits them in evidence, why I gather that the Japanese characters which are there conform to your Honor's and the interpreter's best idea of the reproduction of the Japanese characters on the original, is that correct?

Mr. Adachi: Yes.

The Court: Well, you are technically right.

(Testimony of Eisuke Ikinaga.)

There is no basis for producing a substitute. However, this is simply marked for identification.

Mr. Kashiwa: Your Honor, at a later time when it is received in evidence I will——

The Court: I think it is perfectly safe in the Clerk's custody. And for all any of us know, he may have made a will yesterday in Japan. Proceed.

Q. Mr. Ikinaga, did Mr. Kaneichi Nii own any shares in the Waipahu Garage?

A. Yes, he had. He has about 300, a little over 310, somewhere between 310 to 320.

The Court: Who has?

The Witness: Mr. Kaneichi Nii.

Q. I mean in 1935, how many shares did Kaneichi Nii have?

A. I was speaking of that time, 1935. At the present [97] we have declared dividends. And he has exactly doubled that amount.

Q. Mr. Interpreter, you mean stock dividends?

A. Yes, stock dividends.

Q. In 1935 how many shares were there outstanding?

Mr. Gross: If the Court please, I would like to object to this line of questioning on the grounds that the corporate structure of the Waipahu Garage is not before the Court. A certain piece of real estate has been vested. Counsel claims that the real estate was given from the father to the son. The Court in its indulgence has permitted Counsel to go into a lot of surrounding circumstances. Now, I cannot see what the corporate structure of the Waipahu Ga-

(Testimony of Eisuke Ikinaga.)

rage—I'd like this thing to lead up to the issue which Counsel himself has created, namely, that there was a gift to this man of this property which we vested. This seems to me to be pretty far afield.

Mr. Kashiwa: I offer to prove that this so-called agreement, that even after the father went back to Japan, although the stocks remained in the father's name, up to 1939 when it was changed to his son's name, although it was in the father's name, still the dividends were paid to Shoso Nii as the beneficial owner. And to show, your Honor, that all of the property in the Territory was dealt with in accordance with that agreement. It is circumstantial evidence.

The Court: Well, you are now asking this witness to tell [98] you how many shares in the whole corporation there were. I am not interested in this corporation.

Mr. Kashiwa: All right. I will withdraw that question.

Q. When were these shares in Kaneichi Nii's name changed to Shoso Nii's name?

The Court: You are assuming something.

Mr. Gross: I object to that, that it is a leading question.

Mr. Kashiwa: I will withdraw that question.

Mr. Gross: And on the grounds it is irrelevant.

The Court: It is withdrawn.

Q. Were these shares in Kaneichi Nii's name, which were in Kaneichi's name, Kaneichi Nii's

(Testimony of Eisuke Ikinaga.)

name in 1935 at any time changed to Shoso Nii's name?

Mr. Gross: Objected to as being a leading question. If you want to ask him whether they were changed, state what was done with the stock certificates, and that is a different matter. I still want to maintain that the entire line—I want to maintain the entire line of objections to this whole line of questions on the grounds that it is not before the Court. It is not an issue that has been framed by the pleadings.

The Court: Overruled.

A. Yes, it was subsequently changed to Mr. Shoso Nii's name, but I do not recollect exactly when that was. [99]

Q. During what year was it?

The Court: Wait a minute. I've got to follow this. I don't mean to be interrupting but I can't follow this. He jumps around. He says later it was changed. What was changed? What is he talking about?

Mr. Kashiwa: The three hundred and some.

The Court: Well, I want him to tell me. I want the witness to tell me.

A. The name on the stocks were changed, the shares were changed from Mr. Kaneichi Nii's name to Mr. Shoso Nii's name. I do not know when that change took place.

Q. Was that immediately after 1935?

A. I don't remember.

(Testimony of Eisuke Ikinaga.)

Q. Now, after Kaneichi Nii returned to Japan, whom did you pay the dividends to?

Mr. Gross: Objected to as calling for a conclusion of the witness. The best evidence of who they paid the dividends to would be the cancelled checks.

Mr. Kashiwa: No, your honor.

The Court: Depending to whom the dividends were paid.

Mr. Gross: I object to the form of the question and I object to the substance of the question. There is no testimony that dividends were paid. And if Mr. Kashiwa is trying to prove that the dividends were paid to someone other than the registered owner of the stocks, I think the best evidence of that [100] would be the cancelled checks.

Mr. Kashiwa: Your Honor, the paying of dividends—an official of the corporation may testify to whom he paid.

The Court: The best evidence would be the records of the corporation.

Mr. Kashiwa: This is not, your Honor, a document. A payment, your Honor, need not be proved. It is not documentary. The best evidence, when there is any document, the act of payment, your Honor, whether it is paid by check—you don't have to bring the document or the book in; payment, to whom it was paid, that is a matter any witness could testify to if he has any knowledge of it.

The Court: Not in the face of the best evidence rule. Without doubt, as an officer of the corporation, he probably knows. But you are met with the best

(Testimony of Eisuke Ikinaga.)

evidence objection, and with the best evidence of to whom the corporation paid dividends, and that is the corporate records. There is no question about that.

Mr. Kashiwa: Your Honor, I am not proving any contents of any documents.

The Court: No, you are trying to prove to whom the corporation paid dividends. And the best evidence of what is the corporate records. There is no question about that.

Mr. Kashiwa: Your Honor, the payment of the claim to whom it was paid—I am not proving the contents of any record, [101] I mean any document. The best evidence rule applies, your Honor, only when I try to prove the contents of a document. I can cite that right in this——

Mr. Gross: I think the best evidence rule applies when you are trying to prove anything than by the best evidence. In other words, if you are trying to prove anything by secondary evidence, I believe it is incumbent on the Counsel to show that the best evidence is not available and that therefore secondary evidence must be admitted into evidence. Now, the Waipahu Garage is not so far away from here. If Counsel has any serious objections to producing the checks showing the payment, I think he should so state. I think the best evidence as to whom the dividends were paid would be the cancelled checks or books of the corporation. I don't want the Court to feel that we are objecting to a statement or a fact that dividends were paid. That is not what

(Testimony of Eisuke Ikinaga.)

we are invoking the best evidence rule on. We are invoking the best evidence rule as to whom they were paid to. As a matter of fact, we don't know whether dividends were paid or not. The corporate records would be the best evidence of all of that. And they are not so unavailable. Waipahu Garage is a matter of a half hour's automobile drive from here.

The Court: It seems to me, in the face of the best evidence rule, that the objection is well taken.

Q. Mr. Ikinaga, do you have at your Waipahu Garage [102] a book showing the payment of dividends? A. Yes.

Q. Do you have the cancelled checks showing the payment of dividends? A. Yes.

Q. Will you be able to produce those tomorrow?

A. Since about a week ago we had moved to Pearl City and everything is rather congested now. I doubt if I can find the records from now until tomorrow morning.

Q. And you have the stock book there?

A. Yes.

Q. Can you bring that in?

A. Yes, I think I can.

Mr. Kashiwa: That will be all the questions of this witness for the time being, your Honor.

The Court: Cross-examination?

Mr. Kashiwa: That is, I haven't rested yet. For the time being.

The Court: You mean you haven't finished with the witness?

(Testimony of Eisuke Ikinaga.)

Mr. Kashiwa: Our direct examination is not finished.

The Court: That is clear. You may cross-examine if you wish at this time on that which the witness has testified to. Or you may reserve your right to cross-examine. Which do you wish to do? [103]

Mr. Gross: We will cross-examine at this time and reserve the right to further cross-examination.

The Court: All right.

Cross-Examination

By Mr. Gross:

Q. Mr. Ikinaga, did you ever converse with me in English? Wait a minute. Did you ever converse with me in English at the Waipahu Garage on the night of the stockholders meeting out there? Do you understand what I said? Did you talk with me? A. Not good understand.

Q. But you talked to me in English when we were at a stockholders meeting at the Waipahu Garage, didn't you?

A. Well, at that time I talk mostly Japanese.

Mr. Gross: That's all.

The Court: The witness is excused subject to reporting tomorrow for further examination. Next witness.

(Witness excused.)

SHIGEO MATSUURA,

a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

The Court: Will you please state your name, age, residence, occupation and citizenship?

The Witness: My name is Shigeo Matsuura.

The Court: Once again? [104]

The Witness: M-a-t-s-u-u-r-a.

The Court: How old are you?

The Witness: Thirty-two.

The Court: Where do you live?

The Witness: Upper Manoa Road.

The Court: Honolulu?

The Witness: Yes.

The Court: And what is your occupation?

The Witness: Accountant.

The Court: Of what country are you a citizen?

The Witness: U. S., United States.

The Court: Exclusively, only?

The Witness: What is that?

The Court: Only?

The Witness: Yes, sir.

The Court: Take the witness.

Q. (By Mr. Kashiwa): What is your occupation?
A. I am an accountant.

Q. How long have you been an accountant?

A. Ever since the latter part of July, 1935.

Q. Where did you work in July, 1935?

A. For Omurei, Fred.

Q. Is that accounting firm still in operation?

(Testimony of Shigeo Matsuura.)

A. No. [105]

Q. What happened to it?

A. Ever since Mr. Omurei went to Japan——

Q. When was that?

A. I think that was in 1936.

Q. What happened after that?

A. And Mr. Nagatori and Mr. Akahoshi bought the place.

Q. And what happened to that firm of Nagatori and Akahoshi?

A. They used to have an office in the Dillingham Building but ever since the Government took over the building soon after the outbreak of war, since there was no space, both of them had to split up and Akahoshi took another section of the Dillingham Building and we moved over to Arcade Building.

Q. Who do you mean by “we”?

A. Nagatori Accounting Office.

Q. Now, did Mr. Omurei keep the accounts of the Nii Store at Waipahu? A. That’s right.

Q. In 1935, July, when you got into the Omurei accounting office, was the Nii Store accounting kept by Mr. Omurei?

A. The Nii Store accounts were handled by Omurei accounting office.

Q. It was there when you went there?

A. Yes.

Q. Now, when it split, when the business was transferred [106] was the Nii Store handled by Nagatori and Akahoshi? A. That’s right.

(Testimony of Shigeo Matsuura.)

Q. And after Mr. Akahoshi and Mr. Nagatori divided their business, where did the Nii Store account go to?

A. The Nii Store went to the Nagatori accounting office.

Q. And you have been right through together with Mr. Omrei and then the partnership and now with Mr. Nagatori? A. That's right.

Q. Are you familiar with the Nii store accounts?

A. That's right.

Q. I asked you to bring over some files which you have. Did you bring them over?

A. Yes.

Q. What do you have there?

A. I have the tax returns here.

Q. For what years?

A. From year '38 up to '47.

Q. Whose tax returns?

A. For Shoso Nii.

Q. These are tax returns under what law?

A. For the United States, Federal.

Q. What kind of tax?

A. Internal Revenue.

Q. What kind of income?

A. For the store business as well as the rental.

Q. The net income tax ?

A. Net income tax.

Q. What happened to the returns before 1938?

A. Well, the bookkeeper prior to me used to keep the books but I don't know what happened to the returns.

(Testimony of Shigeo Matsuura.)

Q. Are these from the files of your office?

A. That's right.

Q. Now, these are not the originals, are they?

A. No, that's the duplicate. The originals we have filed.

Q. Will you tell us how these duplicate copies are made?

A. We make a pencil copy which is for our office, and we have the office girls type out the tax return which we file into the Government, and the pencil copy is left over in our office.

Q. Is that done in the usual course of business of your office?

A. That's right.

Q. Now, in all of these income tax returns, is rental shown as a separate item?

Mr. Gross: I am going to object to Counsel questioning this witness about a document which is not before the Court, which has not been identified, which I have not examined, which the Court has not examined, and as far as I know the witness has not examined since he has been here. And if it is [108] the purpose of Counsel to endeavor to get these income tax returns, or whatever they may be, the sheaf of papers, into evidence, I suggest that they be identified and that proper foundation be made before he starts getting a lot of evidence into the record which is off those returns. I think the question which he just asked is so vital and is such a conclusion of the witness that I'd like to have that matter straightened out at this time.

(Testimony of Shigeo Matsuura.)

The Court: Any objection to having them marked for identification?

Mr. Kashiwa: No, your Honor. That may be marked for identification, your Honor.

The Court: Yes. Mr. Clerk——

The Clerk: Plaintiff's No. 2 for identification.

The Court: All of those are 2?

The Clerk: Yes, your Honor. I don't know what they all are.

The Court: How many are there?

The Clerk: There are ten, copies of ten returns from the year 1938 to 1947, inclusive.

The Court: All right. Proceed.

(The documents referred to were marked "Plaintiff's Exhibit No. 2 for identification.")

Mr. Kashiwa: Your Honor, at this time may I temporarily withdraw the witness here for the purpose of introducing a [109] power of attorney?

The Court: Through another witness?

Mr. Kashiwa: Yes, your Honor. In order that this witness testify, we must prove the power of attorney.

The Court: All right. You are excused temporarily.

(Witness excused.)

Mr. Kashiwa: Mr. Mikami.

Mr. Gross: He is not here. You didn't subpoena him.

Mr. Kashiwa: He is out here.

Mr. Gross: But I am not going to subpoena

(Testimony of Shigeo Matsuura.)

him. He is not my witness. If the Court please, I want to object to Mr. Mikami's testimony on the grounds that he was subpoenaed by the Plaintiff. He was subpoenaed by the Plaintiff in this case.

The Court: Well, I am not interested in who subpoenaed him. I am interested in the fact that he is here.

Mr. Gross: If the Court please, I think we might be able to save some time here. If all that Mr. Kashiwa wants to get into evidence is a certified copy of a power of attorney which was recorded, I think that he has a photostatic copy, at least he showed it to me, of this power of attorney. Mr. Mikami is not competent to testify as to the signature because the signature here is the signature of Shoso Nii, who is in the courtroom. And if Shoso Nii executed this power of attorney, let's put him on the witness stand and let him so testify.

The Court: Well, I do wish that you lawyers would stop talking long enough so I can find out from the witness what is going on here. Most of what I know about this case I get from you gentlemen rather than from the witnesses. Let's proceed, unless you wish to agree with what he is up to there. I want to hear what the witness has to say. Then I may know about what you are talking about. But at the moment I don't. It's like so much Greek to me. You start off with the suggestion that you might save time, but I can't see it.

Mr. Kashiwa: I offer this power of attorney

(Testimony of Shigeo Matsuura.)

executed by Shoso Nii to Katsutoshi Mikami in evidence, your Honor.

Mr. Gross: Objected to as being irrelevant and immaterial.

The Court: There is no basis for its being received at the moment. You called the witness. Get the witness sworn and proceed. Do you speak English?

Mr. Mikami: I cannot.

Mr. Gross: Doesn't he speak English very well?

The Court: What is going on here? You say he does speak good English and then he is subpoenaed by you and I ask him and he say he doesn't speak English. Do you or do you not speak English?

Mr. Mikami: No, I cannot speak English. I cannot speak good English.

The Court: I didn't ask you whether you spoke it well or not. I just asked you whether you spoke and understood [111] English.

Mr. Mikami: No.

The Court: Do you understand the Clerk? He is asking you to take an oath. You listen to him again.

Mr. Gross: Let's just stipulate on this into evidence.

The Court: Stipulate what?

Mr. Gross: This power of attorney. And we can probably excuse this witness. He speaks some English but he apparently doesn't speak it very well.

(Testimony of Shigeo Matsuura.)

The Court: Now both attorneys are agreeable to this document being received in evidence?

Mr. Gross: That's right, this document here.

The Court: Do you wish this witness any more?

Mr. Kashiwa: Just to identify the signature.

The Court: On the tax returns?

Mr. Kashiwa: Yes.

The Court: All right. But he still has got to be sworn. But at the moment this document may be received in evidence as the Plaintiff's exhibit next in order.

The Clerk: Plaintiff's Exhibit "C."

The Court: That is called the power of attorney from whom to whom?

Mr. Kashiwa: Shoso Nii to Katsutoshi Mikami.

(The document referred to was received in evidence as "Plaintiff's Exhibit C.")

[Printer's Note: Plaintiff's Exhibit C is set out in full at page 410 of this printed Record.]

KATSUTOSHI MIKAMI,

a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

The Court: Have you ever been a witness in court before?

The Witness: No, I haven't.

The Court: You are probably scared. You seem-

(Testimony of Katsutoshi Mikami.)

ingly speak English all right. I can understand you. Relax and proceed. Tell me your name, age, residence, occupation and citizenship? What is your name? Your name is what?

The Witness: Katsutoshi Mikami.

The Court: How old are you?

The Witness: Forty-three.

The Court: Where do you live?

The Witness: Honolulu.

The Court: What is your occupation?

The Witness: Soya Company.

The Court: You work there and do what?

The Witness: Soya sauce.

The Court: They make that?

The Witness: No, I deliver to store.

The Court: You deliver it? You are a salesman?

The Witness: Yes.

The Court: And of what country or countries are you a citizen or subject?

The Witness: Japan. [113]

The Court: You are a subject of Japan only?

The Witness: Born in Japan.

The Court: All right. Take the witness.

Q. (By Mr. Kashiwa): Now, from 1941 to the latter part of 1948—'47—you were the attorney-in-fact for Shoso Nii? A. Yes.

The Court: What is the answer?

The Witness: Yes.

The Court: Speak louder. I have got to hear you.

(Testimony of Katsutoshi Mikami.)

Q. You took care of the S. Nii store at Waipahu during those years? A. Yes.

Q. And who made the tax returns for the business?

A. Nagatori accounting, books, Nagatori accounting.

Q. Now, did you see Mr. Matsuura who was on the witness stand a little while ago?

A. Yes.

Q. You know him, don't you? A. Yes.

Q. Did he attend to the books? A. Yes.

Q. Now, the figures from the store were taken by whom to the Nagatori accounting office?

A. I no understand. [114]

Q. The total sales figures and the vouchers were taken over by whom to the Nagatori office? Who took it over there? A. Matsuura.

Q. Matsuura? A. Matsuura.

Q. Who took it over there? Who took the figures and the data to make the tax returns with?

The Court: Do you understand him?

The Witness: I can't.

Mr. Kashiwa: I will withdraw the question.

Q. The daily sales figures, purchases, the figures, who took it over to Mr. Nagatori's office?

A. I took it down.

Q. You did? A. Yes.

Q. The rentals collected from this property here near the Waipahu River, was that reported to Mr. Nagatori? A. Yes.

Q. Now, when Mr. Shoso Nii was absent in Ja-

(Testimony of Katsutoshi Mikami.)

pan, who signed the tax returns, U. S. net income tax return forms? A. Me.

Q. You did? A. Yes.

Q. Now, on one of the copies here,—referring to Plaintiff's No. 2 for identification here—for the year 1943, [115] signature of Katsutoshi Mikami appears. Is that your signature?

A. Yes.

Mr. Kashiwa: That's all.

The Court: Cross-examination?

Mr. Gross: No cross-examination.

The Court: You are excused.

Mr. Gross: We can't excuse this witness yet. He was called by me.

The Court: You called him.

Mr. Kashiwa: No, Mr. Gross called him.

The Court: I repeat, you called him to the stand. That is all I know. He is excused. Now don't argue with me.

(Witness excused.)

The Court: Now you are calling back the same witness who was excused, Matsuura.

SHIGEO MATSUURA,

a witness in behalf of the Plaintiff, having previously been sworn, was recalled and testified further as follows:

Direct Examination

(Continued)

The Court: I remind you, Mr. Matsuura, that you are still under oath. You may continue with your examination.

(Testimony of Shigeo Matsuura.)

Q. (By Mr. Kashiwa): Mr. Matsuura, these U. S. income tax returns between the years 1941 and 1947 were made and officially submitted to [116] you by whom? A. By Mr. Mikami.

Q. And prior to that, for 1940, '39 and '38, they were made, officially presented to you by whom? A. Mr. Shoso Nii.

Q. Now, these are from your files?

A. That's right.

Q. Look at the entire list. Whose tax returns are they? A. It is for Shoso Nii.

Mr. Kashiwa: I offer these in evidence, your Honor.

Mr. Gross: I object to those being offered in evidence. There is no evidence that these are true and exact copies, true and exact copies of the originals. I don't know for what purpose they are being offered in evidence. As far as I am concerned, the income tax returns of Shoso Nii for the years 1940, '38 to '47, inclusive, are completely irrelevant to the issues here. The issue here is whether there was a gift of a piece of real estate. There is no evidence in addition. An examination of these returns shows that they were written in pencil. The witness has not testified that he has personally examined them since he was called by Mr. Kashiwa, and that he knows of his own knowledge that they are true and correct copies of the original; that they were not offered between the time they were prepared and the time they were filed——

(Testimony of Shigeo Matsuura.)

Mr. Kashiwa: I will withdraw my offer at the present time.

Q. Mr. Matsuura, these returns for the respective years from '38 to '47, are they exact copies of the returns as filed? A. That's right.

Q. Now, you look at the returns here. Is there a separate entry in those returns showing rentals received?

Mr. Gross: If the Court please, these returns are not in evidence yet, and I would like to object to the witness being interrogated as to what is in the returns until they have been received in evidence. They have been identified. I don't feel that an adequate foundation has been laid to show that they are true and correct copies, that they were made by this witness, if he will testify that he personally made these out, that they were in his own handwriting—something so that I know that these didn't just come from a file. There may have been several copies. It is not unusual for people to make mistakes in preparing income tax returns and they have to make several pencil copies if for no other reason than a mistake in arithmetic.

Mr. Kashiwa: Your Honor, he testified that these are true copies of the returns as filed.

The Court: Yes, he has testified to that. Now you are asking him as to the substance or contents of these documents, and they are not yet in evidence, and I don't think you can. [118]

Mr. Kashiwa: I will offer these in evidence at this time.

(Testimony of Shigeo Matsuura.)

The Court: And the purpose is?

Mr. Kashiwa: The purpose is to prove that Shoso Nii during these years, as shown in the tax returns, paid the taxes on the income from the rentals of this particular property in dispute.

The Court: Is there anything there to reveal as to that which was headed "rentals" that came from this property?

Mr. Gross: I haven't had a chance to examine the returns.

The Court: There appears to be on these returns a place for reporting rentals received during the year, but at the moment, unless this witness supplements his testimony, how do I know these are the rentals you and Mr. Gross are talking about?

Mr. Kashiwa: I will prove that. I will offer to prove that the rentals as indicated in the net income tax returns, the greater portion of the rental is rental from this property.

The Court: Do you wish to do that before pressing your offer?

Mr. Gross: Sorry, I didn't get that.

The Court: I pointed out to him that even assuming—or let me reword that—that the rentals reflected therein are not revealed by those exhibits for identification as being rentals from the property that you and he are concerned about. He said he could clear that up. [119]

Mr. Gross: I object to these being received in evidence on the further grounds that they are

(Testimony of Shigeo Matsuura.)

self-serving statements. The income tax return filed by the average person is prepared by himself or by someone under his employ to reflect a certain condition. We are talking about the title to a piece of real estate here.

The Court: Well, sometimes I wonder what we are talking about or trying. But I can't quite conceive in this day and age income tax returns being self-serving especially when we get taxed so much.

Mr. Gross: I have had that ruling sustained on me.

The Court: That doesn't impress me particularly. Well, anyway, at the moment no showing has been made what rentals are being talked about.

Mr. Kashiwa: All right. I will withdraw that offer for the time being, your Honor.

Q. Have you examined these returns? Now, in all of the returns from '38 to '47 there is a column there for rentals, is there not?

A. That's right.

Q. And in all of those returns there are figures in there for rentals received?

A. That's right.

Q. Now, what are those rentals for?

A. Those rentals include income from both, all the [120] property that is under Shoso Nii's name, that is, the entire property that they own, rental from all the property.

Q. Was the rental from the home in which Konno lived received and included in there?

(Testimony of Shigeo Matsuura.)

A. That's right.

Q. And the other tenants on that Waipahu River property?

A. That's right.

Q. And that was included every year in those returns?

A. That's right.

Q. What was the total rental income in 1947 from that Waipahu River property?

A. That portion of the rent I think is being withheld by the Alien Property during the year 1947.

Q. What about 1946?

A. I think it was in both years, '46 and '47, because in '45 they had a total rent of \$3,380.79 which includes income from both properties.

Q. For '45 was that included?

A. That's right, '45.

Q. Between 1938 and '45, then, was the rental from that Waipahu River property all included in that?

A. That's right, everything.

Mr. Gross: I hate to reiterate my objection so much but the witness is testifying from a document which has not been received in evidence, and all of this is going into the record. [121] I move to strike it all until the documents have been put into evidence.

Mr. Kashiwa: I offer these in evidence, your Honor.

The Court: Overruled.

Mr. Kashiwa: I offer these in evidence, your Honor.

The Court: All right. They may be received.

(Testimony of Shigeo Matsuura.)

The pending objection is overruled and you may have an exception on each ground.

The Clerk: Plaintiff's Exhibit "D-1" to "D-10" inclusive.

(The documents referred to were received in evidence as "Plaintiff's Exhibit D-1 to D-10, inclusive.")

[Printer's Note: Plaintiff's Exhibit D-1 to D-10 are set out in full at pages 413 to 442 of this printed Record.]

Mr. Gross: If the Court please, I wonder if the Court would let my objection go through until I cross-examine this witness with reference to these documents?

The Court: Yes, they may run to the line.

Mr. Gross: Thank you.

Q. (By Mr. Kashiwa): Are payments of real property taxes shown on those returns?

A. I believe it is.

Q. Will you take a look there?

The Court: The Clerk has ten of these to mark. I will take a short recess.

(A short recess was taken at 3:10 p.m.)

After Recess

The Court: All right.

Q. (By Mr. Kashiwa): During the period you were at this office, from July, 1935, to the present date, up to the time the Alien Property Custodian's Office took the property in dispute in this

(Testimony of Shigeo Matsuura.)

case, who paid the real property taxes for that property?

Mr. Gross: I object to that on the grounds that there has been no testimony by the witness that he knows who paid the personal property taxes.

The Court: Sustained.

Q. Do you know who paid the real property taxes for the land in dispute in this case, 1935, up to the time the Alien Property Custodian took the property?

A. You mean prior to the Alien Property taking over the property?

Q. Yes.

A. Yes, Shoso Nii paid that.

Q. And that is the Territorial real property?

A. Territorial, that's right.

Q. Who paid the gross income tax for the rent?

A. Shoso Nii.

Q. Since the time you got into the office in 1935 up to the time the Alien Property Custodian took the property?

A. That's right.

Mr. Gross: If the Court please, objection to the whole [123] line of testimony on the grounds that he hasn't testified that he has personal knowledge of the payments.

The Court: You asked that your objection and exception to run to the line on a little different basis than that which you just mentioned. We are constantly faced with that. Witnesses are always

(Testimony of Shigeo Matsuura.)

presumed to be testifying of their own knowledge until it is shown to the contrary. I presume that he is testifying as to his own knowledge. If it is shown otherwise, then I can entertain a motion to strike. All right. Proceed.

Q. Now, there is another tax of the Territorial net income tax. Are you familiar with that?

A. That's right.

Q. In 1935 when you got into the office up to the time the Alien Property Custodian took this property over, who paid the Territorial net income tax? A. Shoso Nii paid.

Q. And the rental from this property?

A. That's right.

Q. Who paid it? A. Shoso Nii.

Q. When was the personal property, the Territorial personal property tax abolished?

A. It was in 1947, I believe.

Q. Prior to that time were there any furnishings in the [124] three houses located on the property in dispute next to the Waipahu River?

A. I wouldn't know about that.

Mr. Kashiwa: That's all.

The Court: Cross-examination?

Cross-Examination

By Mr. Gross:

Q. Did you personally see Shoso Nii pay any of these taxes?

A. Well, I think we have records at the office——

(Testimony of Shigeo Matsuura.)

Mr. Gross: Mark these documents for identification, please, as Defendant's.

The Clerk: You want them separately? "A-1," "A-2" and "A-3" for identification.

The Court: Very well. What is the label describing these documents?

The Clerk: These are Territorial real property tax bills for the years 1945, 1946 and 1947.

The Court: All right.

Q. I hand you papers marked "Defendant's Exhibits for Identification A-1, A-2, A-3" and ask you to examine them and state what they are, if you know?

A. This is the real property tax bill.

Q. Real property tax bill for what?

A. Kaneichi Nii's property for the years 1945, '46 [125] and '47.

Q. Did you pay those tax bills?

A. Well, I will have to look over my records first.

Q. Did Shoso Nii pay them?

A. Whatever Nii paid, it shows Ni paid for it. For those properties which is under Mikami's, I believe he paid for some of it. He took over the leased property, on certain property, you see.

Q. In whose name are those bills made out?

A. Those bills are made out in Kaneichi Nii.

Q. And at whose office were they returned to?

A. Tax collector.

Q. Was the address given for the person who is to pay the tax?

A. Omurei.

(Testimony of Shigeo Matsuura.)

Q. Were you in that office at that time?

A. Well, he was there, I think.

Q. No, my question is, were you in that office at that time?

A. You mean at the time that these were paid?

Q. Yes. A. That I wouldn't know.

Q. Mr. Witness, did you understand my question? A. Yes.

Q. And your answer is still that you didn't know, is [126] that it?

A. You mean the time that he paid, the day that he made these payments? I wouldn't know the exact time.

Q. Have you ever seen bills like that before?

A. I have.

Q. Like those bills there?

A. That's right.

Mr. Gross: I haven't introduced them in evidence yet. You can examine them.

Q. How old did you state that you were?

A. What is the question?

Q. How old did you state that you were? What is your age? A. Thirty-two.

Q. Thirty-two? A. That's right.

Q. In 1935 how old were you?

A. Well, I was about 18 or 19, I believe.

Q. And when did you start to work on the Nii accounts? A. Some time in 1938.

Q. Are you a certified public accountant?

A. No.

Q. Did you attend any accounting school?

(Testimony of Shigeo Matsuura.)

A. Yes.

Q. Where? [127]

A. West Commercial School.

Q. West Commercial School? A. Yes.

Q. By whom were you employed during the years 1945, 1946 and 1947?

A. Nagatori accounting office.

Q. Were you not employed by F. Y. Omurei?

A. No.

Q. Can you, by referring to the exhibits, the income tax returns which have been received in evidence here, state what the real estate taxes were, the amount of the real estate taxes that were paid for the years 1945, 1946 and 1947?

The Court: Exhibit "D."

The Clerk: D-8, 9 and 10.

A. I think for the years Mr. Mikami paid that, if I am not mistaken, because he took over the rental of this portion of the property there.

Q. Then you wish to change your testimony?

A. Not on that property across the river. That we have—I believe I can bring down receipts showing that we paid for that.

The Court: I'm lost.

Mr. Gross: So am I.

The Court: The property across the river?

The Witness: I mean the property in dispute right now. [128] It is a very small real property tax on that. I think I can have the receipts or something to that—that we paid for it.

Q. You were not in the F. Y. Omurei account-

(Testimony of Shigeo Matsuura.)

ing office in the years 1945, '46 and '47, were you?

A. No, that is Nagatori accounting office now.

Mr. Kashiwa: Your Honor, the testimony showed that Omurei went back to Japan in 1936. That is the old address here. And the business was taken over by Nagatori. He is working at the Nagatori office.

The Court: Well, I don't know what you gentlemen know. This man Omurei may have gone to Japan in '36 but he still may have kept his business under that name. I don't know.

Mr. Gross: Neither do I, if the Court please.

The Court: On the facts so far, there are very few things I know about this case.

Q. Will you explain to the Court how you prepared those income tax returns for the years in question? Just exactly what you did to prepare those income tax returns?

A. Well, I had the information from Mr. Mikami during those years and he used to bring over the books every month which we recorded in our books. And at the end of the year we made a tax return on that.

Q. Did you personally examine the books?

A. That's right.

Q. Which Mr. Mikami—you personally examined those books? [129]

A. Yes.

Q. Do you know how the real estate tax bills for the Territory of Hawaii were paid, the manner of payment?

A. You mean on which property is that?

(Testimony of Shigeo Matsuura.)

Q. On the property which you claim is the subject matter of this law suit. You are familiar with the one that is the subject matter of this law suit, aren't you? A. Yes.

Q. Now, in what manner were those taxes paid—by check, cash or by whom?

A. I believe it was by check.

Q. And who drew the check?

A. During those periods in question I think Mr. Mikami signed for them. He was in charge of the Nii store during that period.

Q. So you don't know of your personal knowledge how they were paid, do you?

A. Well, it would be paid by Mr. Mikami, anything to do with Nii's store.

Q. Did you understand the question, Mr. Witness? A. Yes.

Q. Do you know of your personal knowledge how these taxes were paid?

A. Because all the taxes are usually paid by check and I believe that was one of the taxes which was paid by check. [130]

Q. You state you believe. Do you know?

A. Well, I have to go over my records. Then I could tell for sure.

Q. Would your records show how these taxes were paid? A. That's right.

Q. Do you have them here with you?

A. No, I don't have it here.

Q. Can you produce them?

(Testimony of Shigeo Matsuura.)

A. Well, it is down at the office. It is in a big book, ledger, and all that thing.

Q. Well, let's pass that for the time being. Who wrote out the checks payable to the Territory of Hawaii for these tax bills, if you know?

A. All the taxes were brought to Nagatori accounting office and we in turn paid them to the tax office. That wasn't the real property tax alone. That included gross income, unemployment compensation, all together.

Q. Excuse me, Mr. Witness. I want you to confine your answer only to this real estate that is the subject matter of this law suit. I want you to state, if you know of your own knowledge, how those taxes were paid. Who prepared the checks, whether they were prepared in your office, by Mr. Mikami, who signed them, and who took them over to the Territorial Tax Office?

A. That is as I say, I have to look through the records [131] to see exactly what day they paid it and all that. But the checks were issued by Mr. Mikami.

Q. Then am I correct that your answer is that the checks were prepared by Mr. Mikami and that he took them over to the Territorial Tax Office?

A. That is what I was explaining to you, that the checks are not cut just one to each place but it includes both gross income as far as real property, unemployment compensation, all that together. They paid directly to the office in one check and we in turn paid that to the tax office. We have

(Testimony of Shigeo Matsuura.)

to separate that and pay to the Territory of Hawaii and Internal Revenue.

The Court: Let me see if I understand what you are saying. The taxpayer is advised by you as to how much taxes of all kinds and descriptions he owes?

The Witness: That's right.

The Court: And he gives you one check to cover all taxes?

The Witness: That's right.

The Court: And then your office in turn pays the individual taxes?

The Witness: That's right.

The Court: For the person, the client?

The Witness: That's right, yes.

The Court: Then your record should show that your office paid some of these taxes that Mr. Gross is talking about? [132]

The Witness: That's right. But that I have to look through the record to see exactly.

Q. I will ask you to re-examine Defendant's Exhibits "A-1," "A-2" and "A-3" for identification and ask you whether by referring to those exhibits it will assist you in recollecting the manner in which the taxes were paid for those three years?

A. Well, I can't tell for sure. I have to look through the books first to see, because I can't remember all this right offhand.

Q. Have you ever seen tax bills similar to those?

A. I have.

(Testimony of Shigeo Matsuura.)

Q. For this property?

A. I think I have.

Q. Now, I want to call your attention to the years 1935 to 1938. Did you personally have charge of the payment of real estate taxes on the real estate involved in this lawsuit at that time?

A. No.

Q. Who did?

A. It is one of the girls in the office that used to take care of that, all real property taxes. Some people took care of the Territorial income tax, Federal.

Q. Can you state who in your office had the responsibility for paying the Territory of Hawaii real estate taxes on the [133] real estate involved in this lawsuit for the years 1935 to 1941?

A. Well, we have about three girls in the office. I can't tell for sure which one did pay those.

Q. Is your answer that one of the three girls made the payment? A. That's right.

Q. You did not make the payment?

A. No.

Q. Then you don't know how the payment was made, do you?

A. The only thing I know is that it is recorded in the book. That's all.

Q. If the girl should make an error and make the error in recording, then you would be misinformed, would you?

A. But we have the tax receipts to show for that.

(Testimony of Shigeo Matsuura.)

Q. Who makes the entries in those books?

A. I do. You mean on Mr. Nii's books?

Q. With reference to the real estate which is the subject matter of this lawsuit only. That is the only matter that I am directing my question to. Do you understand that?

A. That's right.

The Court: Do you have the question in mind? He has lost the question.

Q. Mr. Witness, I want you to tell the Court who had [134] charge of paying the Territory of Hawaii real estate taxes for the years 1935 to date, if you know?

A. That I can't tell you. Maybe one of the three girls.

Q. What are the names of the three girls?

A. Well, we have girls off and on. A lot of them are not in our employment any more.

Q. By stating three girls, do you mean that they drew the checks and took them over to the tax office?

A. No. Well, we are not collecting just Mr. Nii's money. We collect taxes from all our clients.

Q. Mr. Witness, I want you to confine your answers to the real estate taxes on the real estate involved in this lawsuit. I am not interested in anything else.

A. That's right. But we don't just pay the taxes. We cannot issue one check for 72 cents. We get a lump of all those real property taxes for many clients and pay it at one time.

(Testimony of Shigeo Matsuura.)

Q. Then you did not draw a separate check against the Nii account for these tax bills, is that right?

A. It may be that we have it lumped with some other taxes. But I can't tell you for sure whether it was just one check that we issued on that.

Q. Did you see the tax bills before they were paid?

A. Some years I have. Some years I haven't.

Q. If the girl made a mistake in paying the taxes, whose responsibility was that?

A. Well, if in case of a shortage, they would notify us. And if there is overpayment, they would give us a notice, too.

Q. Who is "they"?

A. The tax office.

Q. Did you ever verify, did you ever examine the bills to see whether they were correct in your opinion?

A. If the receipts came back, I would have checked up together.

Q. Before you paid them?

A. We usually do.

Q. Who at your office examined the tax bills when they came in to see whether they were in order for payment?

A. I think the present one now is Miss Murata.

Q. And how long has she been with your firm?

A. She has been there ever since the latter part of 1941, I believe.

Q. And she was the one who had the respon-

(Testimony of Shigeo Matsuura.)

sibility for verifying these tax bill payments, is that right? A. That's right.

Q. Did she show you the receipted bills after you got them back?

A. I don't remember but if they brought it back we [136] should have it, though.

Q. And then what did you do with the tax bills?

A. We usually stamped that and then put it back together with the other bills and sent it back to Mr. Mikami. He used to bring over the books month by month, invoices and all.

Q. When you say "Mr. Mikami," you are only referring to the years 1941 to '47?

A. That's right.

Q. But prior to the year 1941, from 1935 to 1941, what did you do with the taxes?

A. We have it all together with the other invoices, vouchers, which Mr. Shoso Nii has.

Q. Do you have any present recollection of the name of the person who is shown as the taxpayer on the tax bill? Do you understand the question?

A. Yes. I believe it is shown as Shoso Nii, Kaneichi Nii.

Q. How long has it been shown as Kaneichi Nii? A. That I don't know.

Q. Do you recall any year when it was not shown as Kaneichi Nii?

A. I haven't seen any.

Mr. Gross: That's all.

The Court: Redirect? [137]

Mr. Kashiwa: No further questions.

The Court: The witness is excused.

(Witness excused.)

The Court: Next witness.

SHOSO NII,

a witness in his own behalf, being duly sworn, testified as follows:

Direct Examination

The Court: Will you please state your name, age, residence, occupation and citizenship?

The Witness: Shoso Nii, 34 years.

The Court: Occupation?

The Witness: Merchant.

The Court: Residence?

The Witness: Waipahu, Oahu, Territory of Hawaii.

The Court: Citizenship?

The Witness: American.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

Q. What is your birthday?

A. January 3, 1914.

Q. How many trips did you take to Japan?

A. Two trips.

Q. When was the first trip? [138]

A. First trip was in 1921.

Q. Nineteen what? A. Twenty-one.

Q. When did you come back? A. 1923.

(Testimony of Shoso Nii.)

Q. And when was the second trip taken?

A. 1941.

Q. Prior to your leaving in 1921, what was your address at Waipahu?

A. Waipahu, Oahu, Territory of Hawaii.

Q. Any particular street number?

A. No street number. But I had a box number, 416, Post Office box.

Q. When were you married? How old were you when you got married?

A. Twenty-one years old.

Q. Prior to your going back to Japan this last time, did you reside with your wife here? When you got married,—where did you get married?

Mr. Gross: If the Court please, I'd like to let the witness answer the questions.

Mr. Kashiwa: I will withdraw that question.

Q. Where did you get married?

A. In Honolulu, Territory of Hawaii.

Q. In Honolulu? [139] A. Yes.

Q. And after that where did you live?

A. Waipahu, Oahu.

Q. Now, you testified that you went to Japan in 1941? A. Yes.

Q. When did you go to Japan?

A. June, 1941.

Q. At that time were you registered with the Selective Service? A. Yes.

Q. I show you this card here, Registration Certificate of Shoso Nii, Selective Service Card. Take

(Testimony of Shoso Nii.)

a look at it. (Handing a small card to the witness.)

Is that your card? A. That is mine.

Q. This was issued to you by the Selective Service? A. Yes.

Q. Your Draft Board? A. Yes.

Mr. Gross: I would assume that everybody over the age of 21 had a card issued to them. (Mr. Kashiwa shows the card to Mr. Gross.)

Mr. Kashiwa: I offer this in evidence.

Mr. Gross: I object on the grounds that it is completely irrelevant to the issues here.

Mr. Kashiwa: Your Honor, in the pleadings there is a [140] denial of residence made in this case. Residence is one of the most important things in this case. My contention is that the residence of this Plaintiff was at Waipahu, and it shows.

The Court: Well, at best that might be some evidence of that fact, as of the date of the card. It wouldn't go much beyond that, would it?

Mr. Kashiwa: Then I will follow this up. He did a very peculiar thing. He left——

The Court: Let him testify. I will admit the card for whatever purpose it concerns.

dence as "Plaintiff's Exhibit E-1.")

(The card referred to was received in evidence as "Plaintiff's Exhibit E.")

[Printer's Note: Plaintiff's Exhibit E-1 is set out in full at page 443 of this printed Record.]

(Testimony of Shoso Nii.)

Q. Why did you go to Japan in 1941?

A. To visit my father who was very ill at that time.

Q. Now, did you receive leave from the Selective Service officials?

A. Yes, I got a permit from the Selective Service Board.

Q. For how many months?

A. For five months.

Q. Let me show you a letter here headed Permit of Local Board for Registrant to Depart from the United States. Have you seen that? (Showing a sheet of paper to the witness.)

A. Yes.

Q. Who issued that to you? [141]

A. Official at the local board at Waipahu.

Q. Waipahu board? A. Yes.

(Mr. Kashiwa shows document to Mr. Gross.)

Mr. Kashiwa: I offer this in evidence, your Honor.

Mr. Gross: I object to that on the same grounds, that it is irrelevant to the issues.

The Court: What bearing has this to the issues, the fact that the draft board gave him permission for five months to be absent from the country?

Mr. Kashiwa: That shows, your Honor, if he personally departed from here, he certainly wouldn't be a resident here. But even under the Selective Service law he was supposed to come back within five months, showing that he intended keeping his residence here.

(Testimony of Shoso Nii.)

Mr. Gross: If he had gotten to Japan and war broke out and he didn't return, I am quite sure that the only way the Selective Service Board would have gotten him was the way they finally did get him.

The Court: It may be received as part of the exhibit last received.

The Clerk: The last one would be "E-1" and this one would be "E-2."

(The document referred to was received in evidence as "Plaintiff's Exhibit E-2.") [142]

[Printer's Note: Plaintiff's Exhibit E-2 is set out in full at page 444 of this printed Record.]

Q. When did you arrive in Japan?

A. July 5, 1941.

Q. Then when did you get back from Japan?

A. November 8, 1947.

Q. Why weren't you able to come back?

A. Because there was no transportation at that time.

Q. Did you try to get transportation?

A. Yes.

Q. When was that? A. That was in 1941.

Q. What month?

A. It was either September or October. I don't remember quite clearly.

Q. How did you attempt to get transportation?

A. I saw the American Consul at Kobe to find out if there was any means of my getting back here.

(Testimony of Shoso Nii.)

Q. And what did you find out from the American Consul?

A. Since there was no boats coming from Japan, he told me to hold my papers until the transportation resumed.

Q. Was there any possible way of coming home?

Mr. Gross: I object. How can a witness know whether there was any possible way of coming home? He said that he tried. The question was, was there any possible way of coming home? For whom? For this witness or for——

The Court: I presume he means for this witness. It is [143] quite evident.

Q. Answer the question.

A. The American Consul told me that there might be a way of coming back through Shanghai and Manila but they weren't sure, and I told the hotel people in Kobe about it, and they weren't sure. So I let the thing go.

Q. You said American Consul. American Consul where? A. At Kobe.

Q. Informed you? A. Yes.

Q. By what? A. By letter.

Q. You came back in November of 1947. Did you receive a permit to return? A. Yes.

Q. By whom?

A. By the American Consul at Kobe.

Q. You came back on that permit? A. Yes.

Q. What was your father's name?

A. Kaneichi Nii.

Q. Is he still living? A. Yes.

(Testimony of Shoso Nii.)

Q. Now, there has been testimony that there are three children in the family. How many sons? [144]

A. One son and two daughters.

Q. And you are the only son? A. Yes.

Q. Where are the two daughters living?

A. In Japan now.

Q. What school did you go to?

A. Waipahu school.

Q. What was that, a high school or elementary?

A. Elementary school, eighth grade.

Q. How many grades were there in that school?

A. Eight grades.

Q. Did you graduate? A. Yes.

Q. After that did you go to any school?

A. I tried to enter Kalakaua Intermediate School but since my father wanted me to work in the store——

Q. Just a moment, now. This Kalakaua school, did you make an application there?

A. Yes, I took the examination and application at the same time.

Q. Were you accepted? A. Yes.

Q. Did you go to that school? A. No.

Q. Why didn't you go to that school? [145]

A. My father wanted me to work in the store.

Q. What store? A. In my father's store.

Q. Situated where? A. At Waipahu.

Q. Did you do that? A. Yes.

Q. Did he give any reasons why you should work at his store?

(Testimony of Shoso Nii.)

A. Yes. I was the only son and since our salesman who was doing all the work outside was ill——

Q. What is his name?

A. Miyasato. And he had to leave for Japan. I stayed in the store and helped my father.

Q. Did your father promise you anything?

A. Yes. He promised to give me everything that he owned in the Territory.

Q. When——

Mr. Gross: I make a motion to strike his testimony unless it is stated as to the time and place of the conversation, the date, and who was present, if anyone.

By Mr. Kashiwa:

Q. When was that promise made?

A. Well, he promised that quite often but the last time I recall was the last supper we had, the family had together. [146]

Q. When was the first time he made that promise?

A. Since I left, since I graduated from Waipahu School.

Q. Where was that conversation held between you and your father?

A. At the dinner table.

Q. Where? A. At our home.

Q. Was anybody present there?

A. Yes, my mother and my wife were there.

Q. Was your wife there at that time?

A. Yes.

(Testimony of Shoso Nii.)

The Court: You were married when you got out of grammar school?

The Witness: No, the last time.

Q. Oh, you are talking about the last time?

A. Yes.

Q. How about the first time, when you got out of school in 1928?

A. Well, that was so far back that I don't recall exactly where he made that conversation. But we used to go to town in the same car together and he told me in the car, at home—well, he told me quite often about giving me the properties.

Q. What properties?

A. The whole property, everything that he owned here. [147]

Q. Where? Here in the Territory of Hawaii?

A. Yes.

Q. When would he give it to you, did he say?

A. When he died or when he leave this country. That means the Territory.

Q. About what year did you graduate elementary school? A. Around 1928.

Q. When did you receive the store?

A. In 1933.

Mr. Kashiwa: Your Honor, from now on there are a few documents here which are already admitted, and now——

The Court: You will have to pull them out. They will have to be given a marking in this trial.

Mr. Gross: Well, these admissions of fact have attached to them copies of all these documents with

(Testimony of Shoso Nii.)

the recording data on them, and I just wondered if at this time we couldn't agree or state into the record and give them exhibit numbers, refer to them by reference, and then we could probably shorten it. They are all made a part of this.

The Court: Well, I find that it is four o'clock. We will suspend for the day, and between now and tomorrow morning you can decide just in what manner you propose to handle that. It would seem to me that even though these documents are already in the file, they should be given identifiable markings for the purpose of the trial. So until tomorrow at nine we stand adjourned.

(The Court adjourned at 4:00 p.m.) [148]

Honolulu, T. H., Nov. 30, 1948, 9:00 o'clock a.m.

The Clerk: Civil No. 837, Shoso Nii, Plaintiff, versus Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, for further trial.

The Court: Are the parties ready?

Mr. Kashiwa: Ready.

Mr. Gross: Ready for the Defendant.

Mr. Kashiwa: Your Honor, Mr. Shoso Nii was on the stand. I have a very short witness, Mr. Kinney, who must be back in Waipahu by ten. He is a member of the bar. And I'd like to put him out of order.

The Court: Any objection?

Mr. Gross: No objection.

The Court: Very well.

OLIVER KINNEY,

a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

The Court: Will you please state your name, age, residence, occupation and citizenship?

The Witness: Oliver Kinney, 49; I am an attorney, business agent.

The Court: Residence?

The Witness: 3014 Kiele Street, Honolulu. [149]

The Court: Citizenship?

The Witness: United States citizenship.

The Court: Exclusively?

The Witness: Yes.

The Court: Take the witness.

By Mr. Kashiwa:

Q. Mr. Kinney, did you at any time buy any property in Waipahu from Mr. Shoso Nii?

A. Yes, in 1941, the spring of '41.

Q. Where was that property situated?

A. At the intersection of Farrington Highway and Depot Road in Waipahu Village.

Mr. Gross: Excuse me. Farrington Highway and what?

The Witness: Depot Road, D-e-p-o-t.

Q. Do you know where the property in dispute in this case is situated?

A. Well, approximately it is across the Kapakahi Stream from the Depot Road in Waipahu Village.

Q. That is also known as Waipahu River?

(Testimony of Oliver Kinney.)

A. Well, it is known as Waipahu Stream, Kapakai Stream.

The Court: Kapakai?

The Witness: Kapakai. It is a little winding stream, so some call it a Kapakai stream.

Q. There is a map showing the old highway "A," and "C," the old, and "D," the Depot Road. Will you indicate on [150] this road where this property which you purchased was situated?

A. At this intersection. (Indicating on map.)

Q. Take the chalk and mark it out.

A. I take it that this goes out to Waianae.

Q. Yes.

A. And this goes up to Waipahu Village?

Q. Yes. A. And this is Kapakai street?

Q. Yes. A. It is this piece in here.

Q. The parcel marked "X"? A. Yes.

Q. In whose name was that property at the time of your purchase?

A. Well, I dealt with Shoso Nii, although the tax maps in the city here gave the name of Kaneichi Nii.

Q. Kaneichi? A. Kaneichi Nii.

Q. Now, will you give us the conversation you had with him at the time you made the deal?

A. Well, I saw a "For Sale" sign on the property and it gave the name of S. Nii as the party to refer to. So I stopped at the Nii store in Waipahu Village and met Shoso there and spoke to him about the property. And he quoted a price of \$3,300 for the parcel. It was about 15,198 square [151] feet, I

(Testimony of Oliver Kinney.)

believe, more or less. And after checking the title to the property I saw him again several days afterwards and told him that I thought there was some defect in the title. I mean there was a cloud in the title that I would have to clear that out by Land Courting the title which would cost me approximately \$500.00. And I would, therefore, offer him \$2,800 for the property. And he accepted the \$2,800, the offer.

Q. The deed was drawn from whom to whom?

A. The deed was drawn from Shoso Nii, as attorney-in-fact for Kaneichi, Kaneichi Nii to me as purchaser.

Q. Now, at the time the price was reduced, you said there was some Land Court application necessary to cost \$500? How long did it take for him to decide to sell it for \$2,800?

A. Well, when I went back there to him, I mentioned the figure \$2,800 to him.

Q. Yes?

A. After explaining to him that I would have to clear the title, and would, therefore, offer \$500 less than the price he quoted me. And he accepted it right there, \$2,800, after my explanation that I would have to spend that much money to clear the cloud.

Q. Did you pay the \$2,800? A. Yes.

Q. To whom? [152] A. To Shoso Nii.

Mr. Kashiwa: That's all.

The Court: Cross-examination?

Mr. Gross: No cross-examination.

The Court: You are excused.

(Witness excused.)

Mr. Kashiwa: Our interpreter is not here. The Waipahu Garage man is back with the books. I have instructed the interpreter to be back.

Mr. Gross: Suppose we proceed to get these documents into evidence now?

The Court: Yes. When we adjourned yesterday there was some discussion about marking as exhibits matters that were already in the record.

Mr. Gross: If the Court please, these are documents which we have asked Counsel to admit the genuineness of photostatic copies certified, and these documents have been admitted to be true and genuine by paper filed in this case by Counsel for the Plaintiff.

The Court: That is correct?

Mr. Kashiwa: Yes. And by you also. You stipulate?

Mr. Gross: Yes.

The Court: These documents are attached to——

Mr. Gross: They are attached to the affidavit.

The Court: Of Mark Huckestein. [153]

Mr. Gross: Of Mark Huckestein.

The Court: Filed March—filed August 30, 1948. And they are——

Mr. Kashiwa: First a deed from T. Ota to Kaneichi Nii of the property in dispute, dated December 27, 1932.

The Court: That may be marked—oh, recorded?

Mr. Kashiwa: Recorded in Liber 1189, pages 91 to 93.

The Court: That may become—who is offering it?

Mr. Kashiwa: I will.

The Court: That will become——

The Clerk: Plaintiff's Exhibit "F."

(The document referred to was received in evidence as "Plaintiff's Exhibit F.")

[Printer's Note: Plaintiff's Exhibit F is similar to Exhibit No. 2 set out at page 53 of this printed Record.]

Mr. Kashiwa: Bill of sale from Kaneichi Nii, of the K. Nii Shoten, to Shoso Nii, dated January 2, 1933, recorded in Liber—recorded in the Bureau of Conveyances, Liber 1205, pages 26 to 27.

The Court: That may become——

The Clerk: Plaintiff's Exhibit "G."

(The document referred to was received in evidence as "Plaintiff's Exhibit G.")

[Printer's Note: Plaintiff's Exhibit G is similar to Exhibit No. 1 set out at page 51 of this printed Record.]

Mr. Gross: The only question I have is whether these exhibits should be determined as Plaintiff's exhibits or Defendant's exhibits or the Court's exhibits.

The Court: It is too late now. [154]

Mr. Kashiwa: Deed from T. Ota to Kaneichi Nii, Liber 1451, pages 418 to 420, dated July 23, 1938.

The Court: That may become——

The Clerk: Exhibit "H."

(The document referred to was received in evidence as "Plaintiff's Exhibit H.")

[Printer's Note: Plaintiff's Exhibit H is similar to Exhibit No. 3 set out at page 57 of this printed Record.]

Mr. Kashiwa: Power of attorney of Kaneichi Nii to Shoso Nii, dated February 7, 1939, Liber 1503, pages 192 to 192—pages 190 to 192.

The Court: That may become——

Mr. Kashiwa: No, 193.

The Clerk: Plaintiff's Exhibit "I."

(The document referred to was received in evidence as "Plaintiff's Exhibit I.")

[Printer's Note: Plaintiff's Exhibit I is similar to Exhibit No. 6 set out at page 64 of this printed Record.]

Mr. Kashiwa: Power of attorney from Saku Nii to Shoso Nii.

The Court: That is the mother?

Mr. Kashiwa: Dated February 7, 1939, recorded in Liber 1503, from pages 194 to 197.

The Court: That may become——

The Clerk: Plaintiff's "J."

(The document referred to was received in evidence as "Plaintiff's Exhibit J.")

[Printer's Note: Plaintiff's Exhibit J is similar to Exhibit No. 5 set out at page 60 of this printed Record.]

Mr. Kashiwa: Certified copy of the Vesting Order, Order No. 9777, recorded in the Bureau of Conveyances, Liber 2070, [155] pages 61 to 64. This is dated September 12, 1947.

The Court: It may become.

The Clerk: Plaintiff's Exhibit "K."

(The document referred to was received in evidence as "Plaintiff's Exhibit K.")

[Printer's Note: Plaintiff's Exhibit K is similar to Exhibit "A" set out at page 13 of this printed Record.]

The Court: All right. Let the Plaintiff resume the stand.

SHOSO NII,

a witness in his own behalf, having previously been sworn, resumed and testified further as follows:

Direct Examination

By Mr. Kashiwa:

Q. Now, referring to Exhibit "G," a bill of sale, which is in evidence in this Court, it shows that the store, the K. Nii store, was transferred to you on the third day of January on the second day of January, 1933. Do you know that fact? A. Yes.

Q. Did you ever see that bill of sale?

A. Yes.

Q. Now, at the same time what was done with the bank account?

A. It was all changed into my account.

(Testimony of Shoso Nii.)

Q. Where were these bank accounts?

A. Bank of Hawaii.

Q. What accounts were they over there? [156]

A. Savings and check accounts.

Q. Whose names were they in?

A. They were in Kaneichi Nii, my father's name, but changed to my name.

Q. Now, up to the time the store was transferred to you, from the time you graduated from elementary school and worked there, will you tell us what sort of work you did there?

A. I did practically everything that should be done in a store, especially taking orders and deliveries, getting goods from stores in Honolulu, and the major portion of the work of the store was done by me.

Q. What do you mean by taking orders?

A. We go out, house to house, and get——

Q. Where? A. Waipahu, camps.

Q. The plantation camps?

A. The plantation camps in Waipahu.

Q. And what did you do?

A. I took orders and made deliveries.

Q. Now, what percent of the sales in your store was by orders and deliveries?

A. Well, I can't say exactly how much but the most part of the business was in charge accounts. And that comes on orders that I took.

Q. Was your father able to drive a car? [157]

A. No.

Q. Now, when you started to work for the K.

(Testimony of Shoso Nii.)

Nii Store when you finished elementary school, did you drive a car? A. Yes.

Q. What kind of a car was that?

A. A Ford truck.

Q. Did you have a license at that time?

A. Yes.

Q. Now, you know the K. Nii Store, where it is now? A. Yes.

Q. Where it is now situated, where you are operating business right now, don't you? A. Yes.

Q. That store you started to work in in 1928 when you finished your elementary school, was that the same store? A. Yes.

Q. Did you make a map of the location of the store? A. Yes.

Q. You have it there with you?

A. Yes. (Handing a sheet of paper to Mr. Kashiwa.)

Q. And this map shows the new highway, the old highway, and the Depot Road and your S. Nii store?

A. Yes.

Q. And it shows the property in dispute and the property sold to Kinney? [158] A. Yes.

Q. And it is all shown on the map? A. Yes.

(Mr. Kashiwa shows map referred to to Mr. Gross.)

Mr. Gross: I object to it as being irrelevant.

The Court: What is the purpose?

Mr. Kashiwa: Your Honor, to give an idea——

The Court: Illustrative?

Mr. Kashiwa: Yes, your Honor.

The Court: It may become for illustrative purposes only an exhibit.

The Clerk: Plaintiff's Exhibit "L."

(The map referred to was received in evidence as "Plaintiff's Exhibit L.")

[Printer's Note: Plaintiff's Exhibit L is set out in full at page 446 of this printed Record.]

Q. Now, that store you worked in was the same store? A. Yes.

Q. What is the size of that store?

A. It has a frontage of about 75 feet.

Q. And the depth?

A. A depth of about 40.

Q. And what about living quarters?

A. We have the living quarters in the back of the store, joined together with the store.

Q. Do you own the land on which that store is situated? A. No. [159]

Q. What was it? A. Rental property.

Q. From whom?

A. From Waipahu Garage.

Mr. Gross: Did you say it was a rental from the Waipahu Garage?

The Witness: Yes.

Q. Now, during the years back from 1928 to 1933 when you got the store, what hours in the morning did you open and when did you close the store?

A. We opened our store around six in the morning and closed about eleven in the evenings.

(Testimony of Shoso Nii.)

Q. And was that for six days a week or seven days?

A. It is right through Sundays, too.

Q. Through Sundays? A. Sundays, too.

Q. Who did the buying for the store after you got into the store? A. I did.

Q. Where did you buy things from?

A. From the wholesalers in Honolulu.

Q. And who delivered the merchandise?

A. I did myself.

Q. Now, for example, taking one day in that period of time, will you give us your usual routine of work, what you [160] started to do in the morning and ended up with at night?

A. The first thing in the morning we clean up, I clean up the store. Then——

Q. Wait a minute. Clean up?

A. Sweeping and getting ready for the day, and had breakfast; then went to Honolulu to get our merchandise, and I usually came back around, before or right after lunch; then had lunch; then I went out in the camps to take orders and make deliveries that I took the day before. That would take me up to around eight to nine o'clock in the evening. And then I stayed in the store until closing time.

Q. When did you have supper?

A. I had supper after closing, usually around eleven, or ten or eleven o'clock.

Q. And you did that routine from the time you—

A. From the time I finished school.

(Testimony of Shoso Nii.)

Q. Up to when? A. Up to 1941.

Q. When you went to Japan? A. Yes.

Q. Now, after your father turned over the store to you and you said he turned over all the bank money with the savings or checking account to you, who supported your father? A. I did.

Q. Now, where did your father live at that time?

A. He lived together with me.

Q. Where?

A. At Waipahu in the same home.

Q. In back of the store? A. Yes.

Q. When you received that store in 1933, were you married? A. No.

Q. How old were you then? A. I was 19.

Q. No, no. When were you born?

A. January 3, 1914.

Q. Yes, you were 19. A. 19.

Q. That's right. Now, the checking account at the Bank of Hawaii which was transferred to you, after it was transferred to you who signed the checks? A. I did.

Q. Now, your father's support after the store was turned over to you, who supported him?

A. I did.

Mr. Gross: He has answered that question once.

Mr. Kashiwa: All right.

Q. Now, when he went back to Japan, who bought his steamship ticket? A. I did. [162]

Q. Now, who lived with you at the time the store was transferred to you? Who in your family lived with you?

(Testimony of Shoso Nii.)

A. My father, my mother and my youngest sister.

Q. Is she the Florence who is mentioned in that deposition? A. Yes.

Q. What is her Japanese name?

A. Takako.

The Court: Once again?

The Witness: Takako, T-a-k-a-k-o.

The Court: Proceed.

Mr. Kashiwa: There is something else about the interrogatories that I'd like to have. I was asking Mr. Adachi about it.

Q. What year were you married?

A. In 1934.

Q. And what was the maiden name of your wife?

A. Kiyoe.

Q. Is she the same wife you have now?

A. Yes.

Q. Now, at the time just prior to your marriage to her, where was she a resident of?

A. Japan.

Q. Will you tell us the circumstances under which you got married? [163]

Mr. Gross: If the Court please, I want to object to this whole line of questioning on the grounds that it is irrelevant to the issues here.

The Court: Interesting though it may be, what is the purpose?

Mr. Kashiwa: Your Honor, here again at the time of this marriage—an absurd age for a young

(Testimony of Shoso Nii.)

man to get married—I will offer to prove that he never knew her prior to the marriage.

The Court: So what?

Mr. Kashiwa: This was a matched marriage and again the father induced him to get married early because he had all this responsibility, all this responsible business which was all going to be turned over to him. And I think it is relevant, your Honor.

Mr. Gross: It is argumentative but I don't think it is relevant to the issues.

The Court: All right. Go ahead.

A. I didn't know this girl until about a week before she landed in Honolulu. My father told me that since I was going to get everything that he owned here, he ordered me to settle down because I had lots of arguments by then with him about leaving the store and getting in school or going out somewhere to work for myself. But since he said that he was giving everything to me and he wanted me to settle down by getting married to this girl, I did what he told me to. [164]

Q. Now, between the time, from the time you graduated from the elementary school up to the time you received the store, did you receive any wages or compensation? A. No.

Q. Now, there is a deed in the record here, Exhibit "F", Plaintiff's Exhibit "F", purchased by your father from T. Ota of the property in dispute here, on the 27th day of December, 1932. Is that the property in dispute in this case? A. Yes.

(Testimony of Shoso Nii.)

Q. You know about your father's purchase of that property? A. Yes.

Q. Let me show you a map which purports to be a map of that property. (Showing a blueprint to the witness.) A. This is the property.

Mr. Gross: Would you mind if I saw the exhibit before you offer it?

(Mr. Kashiwa shows blueprint to Mr. Gross.)

Q. Will you mark the property here which was bought by your father with this deed, mark it in red?

(Witness writes on blueprint.)

Mr. Kashiwa: I offer this in evidence, your Honor.

Mr. Gross: It is objected to on the grounds that it is irrelevant. There is no evidence as to who prepared it. It is just handed in as a piece of paper. There is already a [165] map in evidence which was admitted in evidence for the purpose of illustration by the Court, and this is probably just an accumulative thing. And if that other map is what it purports to be——

Mr. Kashiwa: This is just for illustrative purposes. It is a larger map of the parcel itself.

The Court: All right. It may be received as illustrative of the shape, size and description. It is not accepted as accurate should any question of dimensions, and so forth, become an issue.

The Clerk: Plaintiff's Exhibit "M".

(The map referred to was received in evidence as Plaintiff's Exhibit "M".)

[Printer's Note: Plaintiff's Exhibit M is set out in full at page 447 of this printed Record.]

(Testimony of Shoso Nii.)

Q. Now, taking this red pencil here, will you—at the time of the purchase of this property in 1932, December, will you indicate, will you tell us whether that was an improved or unimproved lot?

A. It was unimproved lot but had an old house in there, two-story house.

Q. Let me put it this way: At the time of the purchase in December, 1932, was there a house on it or was there not a house on it?

A. There was one house. [166]

Q. All right. Will you indicate that house with your red pencil on that sketch and mark it "A". (Witness writes on map.) Now, after your father bought the property, what improvements were put on there?

A. I had two buildings put in there.

Q. Will you mark those buildings on that map?

Mr. Gross: I move to strike the answer on the grounds that it was not responsive to the question. The question was, what improvements were put upon the property? He said, "I had two buildings put on there." He didn't ask him what he had done.

The Court: That's right. The answer may be stricken.

Mr. Kashiwa: All right.

Q. How many buildings were put on that property after your father bought it?

A. I had two buildings.

Q. How many buildings were put on there?

A. Two buildings were put on there.

Q. All right. You mark those buildings on that map, and mark it "B" and "C". (Witness writes on

(Testimony of Shoso Nii.)

map.) Now, will you describe the buildings "B" and "C", what type buildings they were?

A. It is two-bedroom cottage.

Q. You mean each house?

A. Each house has the same amount of rooms, two bedrooms, [167] one parlor and kitchen and that's all.

Q. How about a bathroom?

A. A bathroom and toilet outside.

Q. Outside? A. Outside.

Q. Will you locate the bathroom and the toilet on this map here and mark it "D"? (Witness writes on map.) Now, when your father bought this property in December, 1932, buildings "B", "C" and "D" were not on the property? A. No.

Q. That was later put on that property?

A. Yes.

Q. Now, you stated that when your father turned over the store to you, he turned over all his money to you, the bank account? A. Yes.

Q. Who paid for all these improvements?

A. I paid for all the improvements through the store.

Q. Through the S. Nii Store?

A. S. Nii Store.

Q. Yesterday Mr. Tsumoto testified that you paid him for some lumber. A. Yes.

Q. Did you? A. Yes. [168]

Q. What was the lumber for?

A. That was for building repairs.

Q. Now, was there any other substantial work

(Testimony of Shoso Nii.)

done on this property in dispute here after your father bought it?

A. We had, I had a stone wall around the property.

Q. On which side of the property?

A. On three sides.

Q. Why did you do that?

A. Because the river at that time was overflowing so often that we had to have the banks higher and firmer.

Q. Will you indicate the stone wall built around this property? Draw it in round dots. (Witness writes on map.)

Mr. Kashiwa: Let the record show that the stone wall is in green.

Q. Now, about how high was that stone wall built?

Mr. Gross: I object to this as being irrelevant, how high the stone wall was. I think we are so far away from the issues——

By Mr. Kashiwa:

Q. And who paid for that stone wall?

A. Through the S. Nii Store.

Q. Did you do any work on that stone wall?

A. Yes.

Q. Mr. Kinney testified here that certain property was sold to him by you. Which property was that? [169]

A. That was——

Mr. Gross: If the Court please, I would like to object to this question. Mr. Kinney testified that the property concerning which he testified was not the property in issue here. And he marked it over here to indicate it was not the property in issue. I am

(Testimony of Shoso Nii.)

just trying to shorten the record. I think it is completely irrelevant.

Mr. Kashiwa: Your Honor, the purpose of this proof is to show your Honor that he had absolute control of this, of the property left in Hawaii by the father, and he sold it even at a price without determining whether it was O.K., whether it was all right with his father. He just made the deal and sold it. And I'd like to get out of this witness how—I will offer to prove that Mr. Shoso Nii kept the entire purchase price to corroborate the evidence of gift in this case, your Honor.

Mr. Gross: If the Court please, there is now in the record the power of attorney running from the father and mother to the son. I believe that an examination of that power of attorney will show that it is a general power of attorney. So that this is just accumulative and doesn't add anything to what recorded documents already show.

The Court: I see no need of going over that which Mr. Kinney testified to. I haven't any reason to doubt that.

Mr. Kashiwa: Your Honor, but the only thing I want to [170] prove out of this witness is what he did with that money.

The Court: You address your question to that aspect of it. That will be a little different.

Mr. Kashiwa: I will withdraw the former question.

Q. Now, with respect to the property you sold to Mr. Kinney in 1941, what did you do with the money?

A. I put it in my bank account.

(Testimony of Shoso Nii.)

Q. Which one?

A. The store, S. Nii Store.

Q. Now, those buildings in the back, 'D', 'C' and 'E', roughly how much did they cost you?

A. About three thousand dollars.

Q. Now——

The Court: Total?

The Witness: Total.

Q. ——your father had other rental property, did he not? A. Yes.

Q. Where were these properties situated?

A. There were two properties in Waipahu.

Q. Where were they?

A. One is in the back of my store, about 400 yards away. And another is opposite the Waipahu Ball Park.

Q. After your father turned over the business to you in 1933, who collected the rentals on these properties? A. I did. [171]

Q. Now, these houses, "A", "B" and "C" shown on the map here, Exhibit "M", map of the premises in issue, were these houses "A", "B" and "C" rented? A. Yes.

Q. And after the business was turned over to you in January, '33, who collected the rentals on those properties? A. I did.

Q. And who paid all the real property taxes on all of the properties? A. I did.

Q. Who paid the gross income taxes on the rental?

A. I did.

Q. And the net income tax? A. I did.

Q. In 1938 in the tax returns here—I will withdraw that.

(Testimony of Shoso Nii.)

Mr. Gross: If the Court please, I'd like to make a motion to strike from the record all of this witness' testimony as to the payment of taxes on the grounds that it is not the best evidence; that the best evidence would be the receipted tax bills or the receipts which he got. It is a self-serving statement.

The Court: The objection comes late.

Q. Shoso, all during the period from 1941 to 1947 when you were in Japan, where did you consider your residence to be? [172] A. Waipahu.

Mr. Gross: If the Court please, he is requesting this man to testify as to a state of mind which existed in the past. I think that the question of what his residence was can be best proven by other than this man's state of mind. It is a self-serving statement.

Mr. Kashiwa: Your Honor, this objection about self-serving, if somebody testifies as to what he says, that may be so. But he can testify as to where his home was, your Honor.

The Court: The objection is overruled.

A. Waipahu, Oahu, Territory of Hawaii.

Q. How many children do you have now?

A. Four children.

Q. Where were your children born?

A. Two were born in Waipahu and two were born in Japan.

Q. Now, in 1921 you mentioned that you went to Japan. A. Yes.

Q. How old were you?

A. I was around seven years old.

Q. And how long did you stay there?

(Testimony of Shoso Nii.)

A. Two years.

Q. At that time did your father have any property there?

A. Yes, he built a home and had fields over there.

Q. What were the fields used for? [173]

A. Rice patches and ordinary farming.

Q. Now, how many acres of these fields did he have?

A. He had about three acres.

Q. And will you describe his home, the one he built?

A. It was——

Mr. Gross: If the Court please, I object to this on the grounds that it is completely irrelevant to the issues here as to whether even the issues as formed by the pleadings by counsel for the plaintiff, as to whether there was a gift of the parcel which was vested by the Alien Property Custodian. The description of his father's house in Japan, I can't see its relevancy to that issue.

The Court: I am not particularly interested in what kind of house it was. You have established that he did have something there. I think the objection is good.

Mr. Kashiwa: Where is the second deed, from Ota to Kaneichi Nii?

The Clerk: The second deed is "H".

The Court: "H".

Q. On July 23, 1938, the date when Exhibit "H" was executed, there is evidence that shows that T. Ota sold to Kaneichi Nii a parcel of property in Wai-pahu. Referring to Exhibit "M" here, the sketch here, will you show us which property that was?

A. This long strip here. (Indicating.) [174]

(Testimony of Shoso Nii.)

Q. Is that the one marked in yellow pencil?

A. Yes.

Q. Will you tell us why that was purchased?

A. Because that was a right of way for the property that Ota had in the back, and if the property in the back were sold to somebody else then the right of way would be taken away from us and we would be, it would be very inconvenient getting in and out from my own property.

Q. Who paid for that land? A. I did.

Q. How much did you pay?

A. I paid \$175.

Q. Now, I notice that the deed is taken in the name of Kaneichi Nii. Why was that taken in his name when your father was in Japan?

A. Because the right of way was together with a bigger lot.

Q. And whose lot, whose name was the bigger lot in? A. In Kaneichi Nii's name.

Q. Now, if these properties were all given to you, Shoso, and you had the power of attorney in 1939—it is the record here—why wasn't it changed over to your name?

Mr. Gross: Objected to as being argumentative and a leading question.

The Court: Sustained. [175]

Mr. Kashiwa: No further questions.

The Court: Before cross-examining, before I allow you to cross-examine, I am going to take a recess.

(A short recess was taken at 9:55 a.m.)

(Testimony of Shoso Nii.)

After Recess

The Court: Cross-examination.

Cross-Examination

By Mr. Gross:

Q. Mr. Nii, you are the plaintiff in this lawsuit?

A. Yes.

Q. Do you know an attorney in the City of Honolulu by the name of Masaji Marumoto?

A. Yes.

Q. Did you consult him shortly after you came back from Japan in 1947? A. Yes.

Q. Did you tell him then that your father had made a gift of this property to you? A. Yes.

Q. How many years were you in Japan on your last trip? A. About six and one-half years.

Q. What did you do when you were in Japan?

A. I helped my father on his farm.

Q. Did you serve in the Japanese Army?

A. No. [176]

Q. Was any pressure put upon you to get you to serve in the Japanese Army? A. Yes.

Q. What did you state?

A. I saw the police station at our village and showed them that I came back from Hawaii on leave through the local board, and showed them the papers that I had with me.

Q. They didn't intern you? A. No.

Q. Did they molest you in any way?

A. Not exactly.

Q. Did they disturb your wife or your children?

(Testimony of Shoso Nii.)

A. No, I don't think so.

Q. In other words, they knew you were an American citizen and they permitted you to go about freely, is that right?

A. Yes.

Q. What did you use for money to live on when you were over there?

A. I brought some money but I spent most of it during the first part of the year that I stayed in Japan, and the rest my father supported me.

Q. How many years did your father support you when you were in Japan?

A. About five, five years.

Q. How many people in your family, your immediate family, [177] did your father support when you were in Japan?

A. Six.

Q. Yourself, your wife and four children, is that correct?

A. Yes.

Q. Did you have to report to any police while you were in Japan?

A. I only saw them once when I showed them the papers.

Q. Your wife was a Japanese subject, was she not?

A. No.

Q. What was your wife, an American?

A. American citizen.

Q. She had been born in Japan?

A. She was born in Hawaii.

Q. Your wife was born in Hawaii?

A. Yes, Waipahu, Oahu, Territory of Hawaii.

Q. Did I misunderstand your direct examination? Didn't you testify that your wife was from Japan?

A. She was born here but went to Japan when

(Testimony of Shoso Nii.)

she was—well, I don't know the exact age but when she was small.

Q. Of what country was she a citizen at the time that you married her?

A. American citizen.

Q. Your mother is Japanese? A. Yes.

Q. Your father is Japanese? A. Yes.

Q. Two of your children were born in Japan, is that correct? A. Yes.

Q. You are the only member of your family, of your father's family, the brothers and sisters, who is not living in Japan, is that correct?

Mr. Kashiwa: Your Honor, I didn't understand that question.

The Court: It isn't too clear. Restate it, please.

Q. Of your father, your mother and your sisters, are you the only member of the family that is not living in Japan? A. Yes.

Q. And they have all been living in Japan since 1935, is that correct? A. No.

Q. Which ones have not been living in Japan?

A. My youngest sister was in Hawaii before that time.

Q. When did she go to Japan?

A. She went to Japan in 1941 with me.

Q. How many of you went to Japan in 1941?

A. We all went, my whole family went to Japan, but my wife and the two children who were born here went to Japan about a month before I went to Japan. [179]

Q. So that after you arrived in Japan there were

(Testimony of Shoso Nii.)

no members of your family remaining in the Territory of Hawaii, is that correct? A. Yes.

Q. Did you hear the answers to the interrogatories which your father gave in the month of October of this year before the American Consulate in Japan?

A. I heard about it yesterday in this courtroom.

Q. How much money did your father say that he took to Japan with him when he went?

A. A hundred thousand yen.

Q. Do you know——

Mr. Kashiwa: I object to that question, your Honor. The statement was not to that effect.

Mr. Gross: I will read the question and answer to him.

Mr. Kashiwa: All right.

Mr. Gross: Question No. 15: "That time . . ."—meaning at the time when your father went to Japan in 1935—"At that time about how much was such property in Japan together with what you brought back from Hawaii on your last trip worth in Japanese yen?" And the answer, "About 100,000 (One hundred thousand) yen, 1935 valuation."

Q. Do you know how much that would be in American dollars approximately in 1935?

A. Well, I don't remember the exchange rate at that [180] time.

Q. Well, your best recollection in 1935, how much was a hundred thousand yen worth?

A. Around \$30,000 in American money.

Q. Do you remember this question, question No. 13——

(Testimony of Shoso Nii.)

The Court: Put to the father?

Q. —put to your father in these interrogatories?

“What did you do with all of your real properties in Hawaii when you last left Hawaii for Japan?”

Do you remember your father’s answer?

The Court: That is a question and answer?

Mr. Gross: That is a question.

The Court: What number?

Mr. Gross: No. 13.

Q. Do you remember your father’s answer?

A. I don’t recollect.

Q. I will read it to you. “After returning to Japan, I made a power of attorney to Shoso Nii at the American Consulate in Kobe about December, 1935, to dispose of my properties in Hawaii.” Do you recall that now?

A. Yes, I sent him the papers to have him sign, to have him sign there.

Q. When did you send him the papers?

A. Well, I don’t remember exactly when but it was about a month before he signed it. [181]

Q. In what year? A. In 1938.

Q. You sent him the papers in 1938?

A. Well, I don’t remember exactly but I know that I sent him the papers.

Q. Who prepared those papers for you?

A. Omurei accounting office.

Q. What man over there? A. Omurei.

Mr. Gross: The Court seems to be——

The Court: I am wondering about an accountant preparing legal documents.

(Testimony of Shoso Nii.)

Mr. Gross: That apparently is an accepted practice.

The Court: It had better change.

Mr. Kashiwa: That is why there is all this trouble, your Honor.

Mr. Gross: Quite possible.

Q. Did you ask the man Omurei in the Omurei accounting office to prepare those papers for you?

A. Yes.

Q. What did you tell him?

A. Since all the property here was left, given to me by my father, I wanted some, well, some kind of document that I can do anything with it, sell or buy or dispose of it.

Q. What did he say to you? [182]

A. Well, he told me to make out a power of attorney and have my parents sign it.

Q. When you went to Japan in 1941, you knew that title to the real estate which is the subject matter of this lawsuit was in your father, did you not?

A. Yes.

Q. You were in Japan from 1941 to 1947, were you not? A. Yes.

Q. Did you at any time ask your father to give you some document which would transfer title to this real estate to you? A. No.

Mr. Gross: That's all.

The Court: Redirect?

Mr. Kashiwa: The only thing, Mr. Gross, is the signature. Will you stipulate as to the signature on the claim?

Mr. Gross: On the claim?

Mr. Kashiwa: Let me show you Plaintiff's Exhibit "A-1" on which appears the signature of Shoso Nii. Is that your signature?

The Witness: Yes.

The Court: Are you through?

Mr. Kashiwa: Yes.

The Court: The witness is excused.

(Witness excused.) [183]

The Court: Next witness.

Mr. Kashiwa: Your Honor, the interpreter we used yesterday is not here, but I am perfectly willing to use Mr. Adachi and Mr. Adachi has volunteered to help.

The Court: All right.

(Masayuki Adachi was sworn to act as Japanese interpreter.)

EISUKE IKINAGA,

a witness in behalf of the plaintiff, having previously been sworn, resumed and testified further as follows:

Redirect Examination

The Court: You are Eisuke Ikinaga?

The Witness: Yes, Ikinaga.

The Court: I remind you that you are still under oath. All right. Take the witness.

By Mr. Kashiwa:

Q. Mr. Ikinaga, yesterday we asked you to bring the stock book and the books showing the payment of dividends. Did you bring that?

A. Yes, I did.

Q. You have the stock book there?

(Testimony of Eisuke Ikinaga.)

A. Yes.

Mr. Gross: If the Court please, may I reiterate my objection to this whole line of questioning at this time, on the grounds that the stock is not part of the subject matter of [184] this lawsuit?

The Court: Yes. Your objection continues to this line.

Q. May we see the stock book?

A. Yes. (Showing a book.) Shall I offer this?

Q. Will you look at the stock book and see when the three hundred odd shares held by Kaneichi Nii were transferred to Shoso Nii?

A. April 9, 1939.

The Court: What about that date?

Mr. Gross: April 9, 1939.

The Court: What is the significance of it?

Mr. Kashiwa: That is the date of the transfer of the shares from Kaneichi, from the father to the son.

Mr. Gross: Let's put it as the date of the re-issuance of the certificates in the name of the son. By Mr. Kashiwa:

Q. Who endorsed the stock in that transfer?

A. Please look at this because I can't read English.

Mr. Gross: The record may show that the witness——

The Court: This is a stipulation?

Mr. Kashiwa: I will stipulate to that.

Mr. Gross: That the witness has produced what purports to be the stock transfer book of Waipahu Garage, Limited, a Hawaiian corporation, and that

(Testimony of Eisuke Ikinaga.)

in that book certificate number 11 for 234 shares of capital stock of Waipahu Garage, [185] Limited, dated September 1, 1928, is issued in the name of Kaneichi Nii; and that across the face of the certificate there is written in red ink the word "cancelled"; and below the words "New certificate issued to Shoso Nii, 4/7/39"; and that this certificate on the back, on the reverse side, has typed in the words "Kaneichi Nii by" and then a signature "Shoso Nii".

Mr. Kashiwa: We acknowledge that that is the signature of Shoso Nii.

Mr. Gross: And further, that in the same stock transfer book certificate No. 24, for 77 shares of the capital stock of Waipahu Garage, Limited, dated November 28, 1934, is issued in the name of Kaneichi Nii, and that on the reverse side—excuse me, that across the face of that certificate the words are written in red ink, or the word written in red ink "Cancelled"; underneath that, "New certificate issued to Shoso Nii"; and that on a stub for certificate No. 27, dated 4/7/39, there is written in red ink the words that the stub shows the issuance of the certificate for 311 shares in the name of Shoso Nii and is written in red ink across that stub "Cancelled. Transferred to Alien Property Custodian, 10/10/46, stock No. 37".

The Court: Very well. Proceed.

By Mr. Kashiwa:

Q. Did you bring your entry book showing the dividends paid by your corporation? Do you have it there? [186]

A. Yes.

Q. In 1935 did your company pay any dividends?

(Testimony of Eisuke Ikinaga.)

A. We did not declare any dividends in 1935.

Q. Did you declare any dividends in 1936?

A. Yes, we paid dividends of 35 and 36, of 35.

The Court: Thirty-five cents?

The Witness: No, profit for the, profit for 1935 we paid in 1936.

Q. Now, after 1936 did you declare dividends continuously? A. Yes.

Q. Now, in 1936 to whom did you declare dividends due on the three hundred shares belonging to Kaneichi Nii?

Mr. Gross: Excuse me. I'd like to have that question repeated?

(The reporter read the last question.)

Mr. Gross: I object to that question on the grounds that he has the records here, and let the records speak for themselves. That is the same thing we had up yesterday.

The Court: I think that is.

Q. Will you open the stock record book, dividend stock payments for 1936. Now, on examining that book, to whom was the 1936 dividend paid?

A. We paid twice. First one paid to Kaneichi Nii.

Mr. Gross: I object, if the Court please, further. I'd [187] like an opportunity to examine this. Maybe we can shorten this. I am perfectly willing that a photostatic copy of this page be introduced as an exhibit.

The Court: Well, see if you can stipulate as to what it shows.

(Testimony of Eisuke Ikinaga.)

Mr. Gross: I'd like the record to show that in view of the difficulty of translation of this witness, that the parties have produced a book which he states is the stock dividends of the corporation, of the Waipahu Garage, Limited; and that on a page which is numbered No. 226—at this time I'd like counsel to agree to furnish photostatic copies for the record—that on page No. 226 there is——

The Court: Start all over again. It is stipulated by counsel, subject to counsel for the plaintiff supplying photostatic copies of these pages—that the book which the witness has produced shows on page——

Mr. Gross: 184, in the month of August, 1936, under a heading "Dividends payable", \$61.89 paid to Kaneichi Nii. And on page 226, December, 1936, shows the sum of \$92.83 paid to S. Nii. That on page 355, in December, 1937, it shows \$185.67 paid to S. Nii. That on page 484, in December, 1938, it shows \$185.67 paid to S. Nii.

Mr. Kashiwa: Dividends.

The Court: Yes, these are all dividends, all relate to dividends. [188]

Mr. Gross: That on page 608, December, 1939, it shows \$185.40 paid to Shoso Nii. That on page—a new series apparently—No. 114, December of 1940, it shows \$185.40 paid to Shoso Nii.

Mr. Kashiwa: That's all.

Mr. Gross: Anything else you want from this book?

Mr. Kashiwa: That's all.

By Mr. Kashiwa:

Q. Mr. Ikinaga, could you lend this book to Mr.

(Testimony of Eisuke Ikinaga.)

Shoso Nii at a later time so he may take pictures of it? A. Yes.

The Court: He understands English now.

Mr. Kashiwa: I will agree to file the photostats later.

The Court: All right.

Q. Now, Mr. Ikinaga, in 1936, December, 1936, up to 1939 when the stock issued to Kaneichi Nii was changed to Shoso Nii, the records show that you paid the dividends to Shoso Nii. Why did you do that?

A. I don't recall the details at that time but since Kaneichi Nii told me that all of the stock was transferred to Shoso Nii, believing his statement, I issued the check payable to Shoso Nii.

Mr. Kashiwa: That's all.

Mr. Gross: Let me try to get along without you, Mr. Adachi. [189]

Recross-Examination

By Mr. Gross (in English):

Q. Mr. Kaneichi Nii was the President of the Waipahu Garage, Limited, was he not?

A. I think at that time he is President of Waipahu Garage.

Q. Was he the President of the Waipahu Garage, Limited, in 1935 when he went back to Japan?

A. Yes, I think until that time. I don't remember so good.

Q. What is your best remembrance on that?

A. I remember he went to Japan. That is where we get another President.

Mr. Gross: Is the Court able to understand the answer?

(Testimony of Eisuke Ikinaga.)

The Court: I might if I could hear him, but I can't hear him.

Mr. Gross: You will have to keep your voice up. The Court has to hear what you are saying. Can you hear me?

The Witness: My English is very poor.

Mr. Gross: Your English is good enough. It is good enough for us. Now you just speak out loud.

The Witness: All right.

Q. We want to know when Kaneichi Nii quit being President of the Waipahu Garage, Limited?

A. I think that he went to Japan, at that time quit [190] President of Waipahu Garage. That is what I think.

Q. You think that he quit being President of the Waipahu Garage at the time he went to Japan in 1935, is that right?

A. Right or not, I just remember that much.

Q. Does Waipahu Garage have a lawyer that represents them?

A. What you say?

Q. Does the company have a lawyer?

A. Yes, at that time we have no lawyer.

Q. When did you first get a lawyer?

A. I remember 1941 or '42 after war start we get a lawyer.

Q. Who organized the company for you when you organized it? Did you use a lawyer then?

A. You told—I cannot understand.

Q. I will try to rephrase the question. When this company, the Waipahu Garage, was originally

(Testimony of Eisuke Ikinaga.)

organized, did you have a lawyer to help you organize it? A. Please——

Q. You want that to be interpreted?

The Court: All right. Put the interpreter back to work. (Through the interpreter.)

A. At that time we organized the company a man named Watanabe helped to organize the company, but I do not know if he was a lawyer or he was associated with some other lawyer [191] for drafting such papers.

The Court: What particular Mr. Watanabe?

The Witness: At this time I don't remember if he is alive or dead.

Mr. Kashiwa: Your Honor, we have an attorney in town by the name of Watanabe but he is much younger. I think he was born on or about 1916.

Q. (By Mr. Gross): Did you ever use a lawyer in the company from the time it was organized up to 1941 or '42?

A. The company was organized latter part of 1916 or early part of 1917 in the name of Waipahu Repair Shop, Waipahu Auto Repair Shop. Later it was changed to Waipahu Garage. And at that time I believe we hired a lawyer.

Q. Who became President of the Waipahu Garage, Limited, after Kaneichi Nii went back to Japan? A. Hashimoto Rinichi.

The Court: The last name is what?

The Witness: R-i-n-i-c-h-i.

Q. What year did you become President of the Waipahu Garage, Limited?

(Testimony of Eisuke Ikinaga.)

A. I don't remember exactly but I believe three or four years ago.

Q. Who sent the dividend checks which are referred to in those books? [192]

A. Yes, I did.

Q. And those dividend checks were given to Shoso Nii because Kaneichi Nii had asked that, is that right?

A. Mr. Kaneichi Nii told me that I transfer all my shares of the company to Shoso Nii; therefore, I issued checks, I gave the check to Shoso Nii.

Q. From 1936 to 1941 did you know who the stockholders of your company were?

A. I think I know because that stockholders were the same, almost same as of '36 and '41.

Q. Did you understand that the law required you to pay dividends to the stockholders of record in your record book?

Mr. Kashiwa: Your Honor, I object to that. That is argumentative, your Honor.

Mr. Gross: I am asking him whether he understood, and this is cross-examination.

The Court: I don't know what office this man held in the corporation at the time you are talking about.

Mr. Gross: All right, let's ask him.

Q. What office did you hold in the Waipahu Garage for each of the years 1935 to 1941, inclusive?

A. I was a vice-president.

The Court: Who was the treasurer?

Q. Who was the treasurer of the company?

(Testimony of Eisuke Ikinaga.)

A. Shigeru Serikaku, I think. [193]

Q. Serikaku? Did you tell the Treasurer to draw the checks payable to Shoso Nii?

A. I did not give instructions at each time but based on instructions I had from Kaneichi Nii I told the Treasurer to issue a check. Also I had the approval of the stockholders meeting.

Mr. Kashiwa: Directors meeting?

A. Directors meeting, that's right.

Q. When you say that you had the approval of the directors meeting, what do you mean?

A. Mr. Kaneichi was the President of the corporation. Since he was resigning, we had that meeting.

Q. Who are your present lawyers?

A. Mr. Tsukiyama.

Q. Has he ever seen this stock transfer book?

A. I don't remember.

Q. Was Mr. Tsukiyama present at the last meeting of the stockholders? A. No.

Q. How long had you and Kaneichi Nii known each other?

A. I went to Waipahu in 1914. At that time Mr. Kaneichi Nii had a small store, and also he had an express business. And at about the same time I opened a blacksmith shop. From that time on I have known him.

The Court: We will take our eleven o'clock recess. [194]

Mr. Gross: I can finish with this witness in about two more questions.

(Testimony of Eisuke Ikinaga.)

The Court: Are you going to have any more redirect?

Mr. Kashiwa: No, your Honor.

The Court: All right. Go ahead.

Q. (By Mr. Gross): Then Mr. Kaneichi Nii was an old friend of yours, was he not?

A. Yes, from that time on I associating with him very intimately as own brother.

Q. And you would have done anything that he asked you to do, would you not?

A. Anything that I can do, I'd be glad to do for him.

Q. And you would do anything you could to help his family, would you not?

A. From my first acquaintance with him I associated just like a brother, so I would be willing to do anything to help the family.

A. And you would still do anything to help Mr. Shoso Nii, would you not?

A. Time is a little different. Time has changed. And I am not at all—I mean the age is different. I was associated with his father so intimately, but the time has changed and Shoso Nii, due to the difference in age of Shoso Nii and [195] myself, I may not—I may ask you to repeat. It is rather confusing.

Q. Yes?

A. Since I was a very good friend of Nii, and as I have been constantly asked about Nii from Japan to help Shoso Nii, I'd be very happy if I

can help Shoso Nii, because I was an old friend of the family.

Mr. Gross: That's all.

The Court: No questions? Very well. The witness is excused. And have the next witness ready.

(Witness excused.)

(A short recess was taken at 11:05 a.m.)

After Recess

The Court: Next witness.

Mr. Kashiwa: Your Honor, at this time I will offer the will which is marked as Plaintiff's for Identification No. 1 in evidence.

The Court: Let me see it. Regardless of the offer, I want to ask some questions about this. Where did you get this?

Mr. Kashiwa: Shoso Nii.

The Court: Where did he get it?

Mr. Kashiwa: I will put him on the stand. Get on the witness stand.

SHOSO NII,

a witness in his own behalf, having [196] previously been sworn, was recalled and testified further as follows:

Direct Examination

The Court: Mr. Nii, where did you get this document?

The Witness: It was in my safe in the store.

The Court: By what authority have you disclosed your father's will?

(Testimony of Shoso Nii.)

The Witness: Looking through my safe I found this document.

Q. (By Mr. Kashiwa): Was it sealed?

A. No, it was in an open envelope.

The Court: Did you have your father's permission to publish it now?

The Witness: No.

The Court: All right. You turned it over to Mr. Kashiwa?

The Witness: Yes.

Q. And this safe you speak of, it was in what safe? A. In my safe in the store.

Q. At the store which was turned over to you?

A. Yes.

The Court: Do you know whether or not since this date your father has revoked this will and made another?

The Witness: No, I don't.

The Court: All right. [197]

Q. Have you found another will or has your father sent you another will from Japan?

A. No.

Mr. Gross: I renew my objection previously stated.

The Court: Have you any questions of the witness on this exhibit or exhibit for identification?

Cross-Examination

By Mr. Gross:

Q. When did you take that will out of the safe, before or after you started this law suit?

A. Before this law suit.

(Testimony of Shoso Nii.)

Q. How long before this law suit?

A. Well, I don't know exactly when but after the store was turned over to me I looked into the safe and found this letter, this will in there.

Q. Was this 'way back in 1933?

A. Well, I don't know exactly what year.

Q. Now, Mr. Nii, you can recollect approximately when you took that out of the safe, can't you?

A. I don't know. I don't know what year but it was after the store was turned over to me in 1933.

Q. Was it in the year 1933?

A. That I can't say because I don't know the year.

Q. Was it in the year 1934?

A. I don't know. [198]

Q. Was it in the year 1935?

A. Well, I don't know.

Q. You want the Court to understand that you do not remember what year you took that document which you claim is the original last will and testament of your father out of the safe of the store in Waipahu, is that correct?

A. Yes.

Q. Was it five years ago?

A. Well, I don't remember the year so I can't say what year.

Q. Well, was it before you went to Japan?

A. Yes, before.

Q. Did you take that will to Japan with you?

A. No.

(Testimony of Shoso Nii.)

Q. You left it in the safe at Waipahu?

A. Yes.

Q. Did you say anything to your father about having taken it out of the safe when you were in Japan? A. No.

Q. Did you discuss a will with your father when you were in Japan? A. No.

Mr. Gross: I renew my objection to the offer of the will.

The Court: Well, we will get to that. Are there any [199] further questions to this witness?

Mr. Kashiwa: No, your Honor.

The Court: All right. You are excused.

(Witness excused.)

The Court: Now, you are offering this last will and testament of a man who not yet dead but which is marked Plaintiff's Exhibit 1 for Identification. You are offering it, I repeat, in evidence. On what grounds?

Mr. Kashiwa: As I stated before, your Honor, the evidence has shown that by agreement he turned over all the properties in Hawaii to Shoso Nii if he left Hawaii or if he died, and it would be all——

The Court: Who testified to that?

Mr. Kashiwa: Shoso did, your Honor.

The Court: I seem to recall that he did, but I want to be sure. All right.

Mr. Kashiwa: Now, there is that promise, your Honor. Of course, we are not at this time relying on the portion about the will, but we are rely-

ing on the portion about leaving Hawaii. He did leave Hawaii. He hasn't died. He is still living. He is 71. But that is one agreement, your Honor, and whether there is any memorandum to support that agreement under the statute of frauds—which I contemplate the Defense will bring up—any written memorandum will suffice. Now, under the Territorial decisions there are very flimsy documents that have been said to be enough to act as memoranda. They are set. If they are documents signed by the parties, it has been held that that is sufficient.

Now, I contend, and it has been held, and I will cite cases right now, that a will—I will cite two cases, your Honor: *Falk versus Fulton*, 262 Pacific 1025, 124 Kansas 745; and *Laune versus Chandless, et al*, 131 Atlantic 634, 99 New Jersey Equity 186. These cases all hold that a will is a sufficient memorandum.

The Court: I haven't any doubt about that, but in those particular cases what are the facts as to whether the man had died and the will had become effective? What are the facts in those cases?

Mr. Kashiwa: Those are cases of that nature, your Honor.

The Court: That the man had died and the will had been probated?

Mr. Kashiwa: In this case the promise is a double promise, your Honor, that is, there is an alternative; if he died it belongs to the son. But there is an agreement. It is one agreement, your Honor, it is one entire agreement. And any memorandum to

support that that agreement, your Honor, I contend is good evidence.

The Court: All right, but what is there here to show me that this memorandum is still effective? How do I know but what the man has cancelled this will by executing another will? [201]

Mr. Kashiwa: Your Honor, in these cases, for example, where there are cases of a subsequent will cancelling that former will, the courts have held that that will which is drawn in accordance with the evidence, with the agreement, may be introduced in evidence,——

The Court: Even though that is——

Mr. Kashiwa: ——and the property does not go in accordance with that will, and the administrator or executor is subject to this equitable promise which is supported by this memorandum.

The Court: Even though the will has been cancelled?

Mr. Kashiwa: Yes, your Honor.

The Court: Where are those cases?

Mr. Kashiwa: I will cite those cases now. In this *Vierra versus Shipman* case, your Honor, the Court did not discuss the competency of the will as evidence but in that very case there was another will which did not give the plaintiff the property as the old man promised. That is how the litigation arose. And the question whether that will was competent evidence was not discussed because the court said the case was taken out of the statute of frauds by the facts in the case. But, your Honor, there are many, many cases. I cannot cite you one

right now, but even in an ineffective will supposing a person makes a will to the person whom he promises to do something for, the will does not affect it, but it is signed by the person, and it is defective. So the property, [202] instead of going to that particular person, goes to somebody else. There are many, many cases to show that, that hold that a defectively signed will may be introduced as a memorandum. It is not as a will but as a memorandum to show that there was such a promise.

The Court: The thing that bothers me is, first of all, I don't see what right this plaintiff has to produce his father's will. It doesn't smell right. Secondly, whatever the man said in this document seems to me to be conditioned upon, as to its effectiveness, his dying. And until such time as he died, the things he said here were not to be bound or binding upon him. And it is obvious from the testimony here that so far as we all know the man is still alive in Japan. Further, there is no evidence that he hasn't in the meantime executed another will and cancelled this one. Perhaps the presumption is that until that is shown that it should be construed as being still in effect. I don't know. But in any event what he here says, he had no intention of this becoming effective until he died——

Mr. Gross: And an additional fact, if I may interrupt, that the will, this alleged memorandum, antedates the promise.

The Court: I hadn't paid attention to the dates.

Mr. Gross: The will is dated 1932.

The Court: When is the date the Plaintiff is supposed to have gotten out of school? [203]

Mr. Kashiwa: 1928.

The Court: What's that?

Mr. Kashiwa: 1928.

Mr. Gross: The pleadings which are filed here, the complaint states that when the Plaintiff's father went back to Japan in 1935—and the Plaintiff testified on the stand that his father called him and the family before he went to Japan and said, had this supposed conversation with him.

The Court: He also testified they had this type of conversation many times.

Mr. Gross: But he didn't identify either the time or the place. And I made a motion to strike the entire testimony, which I think the Court still has reserved a ruling on, on the grounds that it was vague, indefinite and uncertain and did not place either the time or the place or the date of the conversation or who was present. As a matter of fact, this will——

The Court: Wait a minute. I am not hearing you in full. I have just allowed you to interrupt to interject a thought here. How about that, Mr. Kashiwa? The contention is going to be made, so I might as well ask you now, what is your reaction to the proposition that this memorandum that you rely on as exempting the transaction from the statute of frauds is said to pre-date the alleged promise?

Mr. Kashiwa: Well, your Honor, the testimony was that [204] that is the reason why he quit school in 1928. This promise was made to him that he was going to——

The Court: All right.

Mr. Kashiwa: Then, your Honor, may I have a ruling on this?

The Court: Well, I want to hear your theory before I turn to the other side and hear their objections. What are your objections now?

Mr. Gross: And the additional fact, if the Court please, that the will actually antedates the title to this real estate which is the subject matter of this law suit.

The Court: What do you mean by that?

Mr. Gross: I mean that the will was made out at a date prior to the time that Kaneichi Nii acquired title to this real estate here. So if this will is being submitted for the purpose of showing that Kaneichi Nii intended to give this particular real estate to his son, it is completely a nullity because at the time he made the will he didn't own the real estate. I think that the whole line of offer is incompetent and immaterial, besides the other things which the Court has pointed out, the surrounding circumstances how a son happens to be in possession of what purports to be an original testamentary document of his father; the fact that we don't know whether the will has been subsequently cancelled by a new will; the fact that the father is still alive; and the fact [205] that all of the cases which the Court has pointed out to Mr. Kashiwa in which this effort is made are cases in which you have two wills, the man has died and the first will is being offered in evidence for the purpose of showing that the will which was admitted to probate

was not the intention of the testator because he had previously expressed another intention, and the will is offered in evidence for the purpose of showing this intention.

Here you have a document which is dated prior to the time that this man acquired title to the real estate, so obviously he could not have intended this will to be effective as to the real estate which is the subject matter of this law suit because he didn't own the real estate then.

The Court: Well, the promise that has been testified to as having been made to the Plaintiff and repeated several times was first made, according to the evidence, about the time the Plaintiff got out of grammar school. And in exchange for his not continuing school the father, according to the testimony, told him that if he stayed with him and worked in the store, and so forth, and so on, that when the father went back to Japan to stay or when he died, that everything the father had in Hawaii would then become the property of the Plaintiff. Might that not be construed as a continuing promise and include after-acquired property?

Mr. Gross: If the Court please, I believe that we have [206] all, both Mr. Kashiwa and myself, permitted this case to get far away from the issues here. I apologize at this time to the Court. I tried to keep it confined to the issues. We are going into a lot of matters that have nothing to do with this law suit. We vest a piece of real estate in 1947. This real estate was acquired in 1932, prior to the

time that this will was made out, by Kaneichi Nii. Title to this real estate was always in Kaneichi Nii. Now, in an effort to get around what Mr. Kashiwa knows the documentary facts show, he has spun this theory of a promise and has tried this suit as though he were trying to obtain specific performance of a contract against the man's own father. He claims a gift. He claims a verbal gift. He hasn't proven it, because a man with relation to his son probably says many things in the course of a lifetime: son, if you behave yourself you are going to have all of my property. I think all of us feel that way about sons, and particularly in the Japanese family where a first son is particularly important. But the facts which are of record—when these parties were not confronted with this particular law suit, show exactly not what Kaneichi Nii intended to do but what he did do. I don't care how many witnesses you bring in here to say that they had a conversation with Kaneichi Nii, the fact remains that he, a person *Sui juris* and not shown to be incompetent in any way, did certain acts. Those acts can not be disputed because they are matters of record. He made, [207] executed and delivered certain papers which are matters of record.

Now, in an effort to get around a record which is overwhelming against him, Mr. Kashiwa has read a lot of cases in the law of trusts and is trying this law suit either on the theory of specific performance by the son against his father or on the theory of a constructive trust. But he is not trying

it as a Section 9 law suit against the Alien Property Custodian on the theory that title to this real estate was not in the vestee at the time it was vested, and therefore that the Plaintiff had a right to a return of the property. That is the issue before the Court. And all this extraneous material that we have been both very derelict in letting into the record in my opinion is completely irrelevant to the issues.

Mr. Kashiwa: If your Honor please, Counsel seems to think that the title to a piece of real property or patent or anything in a certain person's name, and if he is a resident of Japan or Germany, they take it and that's all there is to it; nobody has any remedy to it. The cases hold, your Honor, that anybody who has an equitable title, or if the A.P.C. by mistake takes it, he has under Section 9 a remedy. And, your Honor, I can cite you a case right now, right here, in which a German, a purportedly German patent was taken because the patentee was a resident of Germany. I will cite that case right now. This is a very late case. It is a very interesting [208] case, Rudenberg versus Clark, the same Defendant as in this case, 72 Federal Supplement 381, where the beneficial owner of a patent recovered the patent right under Section 9(a) suit. Now, I read this case quite a while ago but the legal patent was in an enemy alien's name. But this person—I think he is some professor in some school—he came across, he was not a hostile enemy to this country, and he is a Jewish professor, I think. He positively established that that

was his patent, and he got it back through Federal District Court, and the court in an overwhelming decision, through the circumstances in that case, decided for this professor in that school. That is to say, your Honor, just because a person has the legal title, at the time the enemy has a legal title, the A.P.C. can't take it and say nobody can touch it. The Alien Property Custodian has been held time and time again that it has no more than that person has. If he had nothing, the A.P.C. takes nothing. It is subject to all equity. The power of the Alien Property Custodian does not extend to take powers to take property of citizens of the United States.

Mr. Gross: I beg to differ with you there, Mr. Kashiwa. Where citizens of the United States are cloaking for citizens of Japan or Germany, they have taken it and have been upheld.

Mr. Kashiwa: Where the beneficial owner is a United States citizen, that person can file a 9(a) suit and get it back. [209]

The Court: By way of specific performance?

Mr. Kashiwa: If he has any equitable right, any right which may be recognized in a court of equity or even law, he may have that property returned to him. And in this patent case, that is an equitable right, your Honor.

The Court: Well, as I understand this case, this is a suit by this Plaintiff claiming that the property which was seized belonged to him and not to his father because at some prior time the father had given the property to this Plaintiff. Now, it is in-

cumbent on the Plaintiff to prove that which he asserts, namely, that this is his property, having been given to him by way of gift. The most that I have heard here is that the father promised the son to give him at some time in the future, upon the happening of one or two events, all of his property in Hawaii. The facts, as I see them at the moment, indicate that he gave to the son prior to leaving for Japan his store and the accounts relating thereto. But as to the property which is the subject matter of this law suit, as it looks to me at the moment, what we have here is a situation wherein, though the father may have promised to give the son this property when he left Hawaii or if he died, he didn't actually give it to the son, and the son is here proclaiming this promise of which you claim this will is a memorandum of part of the promise. And you are in effect seeking to enforce the promise against the father in whose shoes the [210] A.P.C. now stand. In other words, you are here on the basis of your evidence as distinguished from your pleadings seeking specific performance against the person who now stands in the father's shoes. And it is, in sum and substance, in effect a suit by the son against his father with the son producing the father's will against the father without authority.

Mr. Kashiwa: Your Honor, that is as far as the will is concerned.

The Court: Well, that is what is before me. That is what I am trying to rule on.

Mr. Kashiwa: The two contingencies, the con-

tingencies about that have not happened, but the contingency about leaving Hawaii has happened.

The Court: Yes.

Mr. Kashiwa: All right. Shoso Nii testified that the father gave him that property.

The Court: But the record shows he didn't.

Mr. Kashiwa: All right, your Honor. There is such a thing as gift of real property, your Honor, without signing over an actual deed. There are many, many gifts of real property sustained in the law books. I can cite to your Honor later showing that a gift of real property, if certain conditions exist, there need not be a deed.

The Court: Gift as distinguished from a binding promise which you can enforce on a specific performance basis. [211]

Mr. Kashiwa: Your Honor, it is my contention that when that father left he gave everything to the son, as he has testified, just before he left he gave everything to him. He actually did give, because the legal title was not changed, but the legal title—the contents have all been given to him. Now, for example, all the benefits, the rental and everything, he has collected.

The Court: That doesn't prove anything.

Mr. Kashiwa: But with surrounding circumstances, I can cite case after case that gifts of real property without these have been sustained. Now, those are in the case books, your Honor.

The Court: I will want to see them. But the only thing that is before me now is whether I shall admit this deed or this will as being relevant to the

issues. Don't talk while I am talking, please. All right. Now, what have you got to say?

Mr. Kashiwa: Another theory under which I wish to present this will is the fact that there was such a promise made, a promise that if he returns from Hawaii he will give it all, or if he dies he will give it. Now, as evidence of that promise—this is signed by the person whose interest Mr. Gross here, the Alien Property Custodian, here claims. Now, it is my contention that this is in addition to that evidence of that promise. It has certain evidentiary value. It is not [212] conclusive, your Honor, but it is a circumstantial matter which may be considered.

The Court: I still think it smells. It is a harsh word to use but I am using it advisedly, for it in turn again is an attempt by the son to prove and hold his father to a promise by producing against his father in effect his father's own will without permission.

Mr. Kashiwa: Your Honor, this will was left in the son's safe.

The Court: There are lots of things I may have in my possession that I haven't any right to use, or you as an attorney. Talking about confidential relations, I should certainly think that the son before producing this against his father would have to have authority from the father to produce it. I don't like the smell of the thing.

Mr. Kashiwa: I have not established this will.

The Court: No, but you are trying to use the father's will as proof to bind the father to a prom-

ise that the father allegedly made, a promes according to the testimony. It hasn't been a whole-some smell here at all, I don't mind telling you. I can't see how I can admit that now. I will certainly want to read these cases that you have been talking about before I do. I am not going to rule on that now. At the end of the case, if you want me to read some of these authorities that you intend to present, that you intend to [213] make this document admissible, I will gladly read them, but at the moment I am not prepared to rule one way or another. And if I had to rule I will rule against you. I will leave it open until the end of the case. If you want to give me some further authorities——

Mr. Kashiwa: Your Honor, at this time I have made an exact copy of the will with the Japanese signatures, copies made by the interpreter who was here yesterday.

Mr. Gross: Well, I think that until such time as the Court finally rules on this matter, we can compare the copies at that time.

The Court: You want the original will left here until I dispose of it? It is as safe in my custody as, I believe, the son's.

Mr. Kashiwa: May this copy be attached to it?

The Court: Yes, the copy may be attached to it. And eventually if I admit it I will probably allow you to make a substitution.

Mr. Kashiwa: Yes, your Honor.

The Court: All right. Anything else?

Mr. Kashiwa: I want to put Mr. Nii back for just two or three questions.

The Court: All right.

SHOSO NII,

a witness in his own behalf, having previously been sworn, was recalled and testified further [214] as follows:

Direct Examination

By Mr. Kashiwa:

Q. Your name? A. Shoso Nii.

Q. Now, did your father at any time buy from Mr. Ikinaga's garage, Waipahu Garage, a Chrysler car for you? A. Yes.

Mr. Gross: If the Court please, I believe this is a matter which was asked the witness before, and I object on the grounds that it was so far away from the issues that the Court stated, that the Court felt it made no difference whether his father bought an automobile in 1928 from the Waipahu Garage.

The Court: Well, certainly it is an afterthought. As to the car, I remember at the moment, without checking my notes, only the specific testimony of the garage man that at some time the father bought a Chrysler automobile, and he did not know in whose name the father took title to the car. As to whether this Plaintiff ever testified about the car or not, I have no recollection. The car I remember his talking about is a Ford truck which he drove.

Mr. Gross: I believe that the Court's recollection is accurate, that that was the testimony of the garage owner. But I am objecting to this witness answering the question on the grounds that it is irrelevant to the issues. I object to the [215] question on the grounds that it is irrelevant.

(Testimony of Shoso Nii.)

The Court: Well, it may be, but I have heard about the car before. Go ahead.

Mr. Kashiwa: Answer the question.

A. He bought me a Chrysler.

Q. What kind of Chrysler? A. A sedan.

Q. When was that?

A. That was in 1931.

Q. Why did he buy you that car?

Mr. Gross: I object to that on the grounds that he is calling for this witness to state the frame of mind of his father in 1935, in 1931. I don't believe this witness is competent to testify as to the frame of mind of his father in 1931.

Mr. Kashiwa: I will withdraw that question.

Q. Did your father tell you why he bought that car for you? A. Yes.

Mr. Gross: If the Court please, it looks like Kashiwa is going to try to get it in the back door again—the same thing. If he wants to place the time and the place and the date of the conversation and who was present——

The Court: The objection to that question is good. The objection is good to that question. [216]

Mr. Kashiwa: On what grounds, your Honor?

The Court: Identify it.

Q. When and where did this conversation take place? A. At our home in 1931.

Q. Was anybody there?

A. Yes, my mother was there.

Q. Your mother? A. Yes.

Q. What was that conversation?

(Testimony of Shoso Nii.)

Mr. Gross: I object at this time on the grounds that this is hearsay.

The Court: How about that?

Mr. Kashiwa: Your Honor, I offer to prove that during the period of time——

The Court: I am not interested in what you are offering. How about the objection to the question which is hearsay? You are asking him to tell us what his father said to him. Isn't that hearsay?

Mr. Kashiwa: The person making the statement is a former owner of the property.

The Court: We are talking about an automobile now.

Mr. Kashiwa: Yes, your Honor, but it all ties up to this promise that he will give all of his property to Shoso when he dies or when he leaves the Territory. I will offer to prove, your Honor, that at many times he, Shoso Nii, wanted to quit and this was one of the inducements to still keep him there.

The Court: All right. We might as well have the whole picture. I think the objection is good but I am going to allow the question.

Q. What was the conversation?

A. Since I left school I wanted to go to school but my father wanted me to work in the store, and we had lots of arguments quite often. And he promised me to, promised me that he would buy a car for me if I stayed in the store, worked in the store. And in 1931 he bought me a Chrysler.

Mr. Gross: I move to strike that testimony on

(Testimony of Shoso Nii.)

the grounds that it does not tend to prove even what Mr. Kashiwa said it would tend to prove. It proves that the father, in order to induce the son to stay in the store, bought the automobile, according to the conversation. I make a motion to strike the testimony.

The Court: Overruled.

Q. Was there any more than that conversation?

A. Well, the car was only part of his——

Q. Just a minute. Whose name was the car put in? A. In my name.

Mr. Gross: I move to strike that on the grounds, if the Court please, that that is not the best evidence, in whose name the title of the automobile was. I think the Court ruled on that before when the President of the Waipahu Garage, [218] Limited, testified, that the best evidence of the title to the automobile would be the certificate which was issued at that time.

The Court: I have so ruled. The objection again is that it is not the best evidence.

Q. Who used that car?

A. I used the car.

Q. Was your father able to drive that car?

A. No.

Q. Now, going back to that conversation, was there any additional conversation?

A. Well, he promised to give me everything that he had but since I wanted to get out from the store he bought me a car.

Q. Now, there was testimony here that your sis-

(Testimony of Shoso Nii.)

ter Hatsuko—no, your sister Florence, resided in the Territory. A. Yes.

Q. After your father left, who looked after her? A. I did.

Mr. Gross: If the Court please, this has all been gone into before by Kashiwa. I think that the witness testified that his sister lived with him in the house there and he took care of her when his father went back to Japan.

Mr. Kashiwa: I don't remember it.

The Court: I don't remember that either. It is late, though. Why are you going into all this now? [219]

Mr. Kashiwa: Your Honor, I am asking to reopen this case for this purpose.

The Court: That's a fine time to ask for it. You are in the middle—all right, go ahead, let's hear the whole story. Get it all in now because this is the last time.

Q. Whom did she stay with?

A. She stayed with us.

Q. Now, prior to your father's departure in 1935, in May, 1935, was there any conversation with relation to that? A. I didn't get the question.

Q. Prior to the time your father left for Japan in 1935, just prior to it, did you and your father have any conversation with relation to Hatsuko's care—I mean Florence's care?

A. Yes, we had.

Mr. Gross: If the Court please, this is hearsay again. I want to repeat, I can't possibly see how

(Testimony of Shoso Nii.)

the conversation with reference to Hatsuko's care has to do with the gift of the real estate which is the theory of the Plaintiff's law suit.

The Court: I'm not sure I can either. Go on.

Q. What was that conversation?

A. Since my father was leaving my sister with me, he told me to look after my sister Florence, and I supported her right through until I went to Japan in 1941. [220]

Q. Was there anything said about giving the property to you at that time? A. Yes.

Q. What was that?

A. Well, it was the same thing, that he would give me all the property——

Mr. Gross: If the Court please, so that the record will be clear, I am objecting to all of this conversation, that it is hearsay and not the best evidence.

The Court: Yes, your objection will be revealed as running to this whole line. Now, the answer is what? What is your answer?

A. He promised me, he gave me all the property in the Territory.

Q. He promised you or he gave?

A. He gave me.

The Court: Let me have that answer again. There have been too many interruptions. What is the answer?

The Witness: He gave me all the property in the Territory.

The Court: Go ahead.

(Testimony of Shoso Nii.)

Q. Now, was this conversation at the dinner table the last night before your father left in which you mentioned that your wife was present, too?

A. Yes.

Mr. Kashiwa: That's all. [221]

The Court: Cross-examination?

Cross-Examination

By Mr. Gross:

Q. Mr. Shoso Nii, as of what date do you claim that your father gave you the real estate which is the subject matter of this law suit?

A. I can't remember exactly the date, but it was in 1935, just the date before he left for Japan. We had supper, the family had supper together, and at the supper table he say that he would give me all the properties in the Territory.

Q. Then I understand it is your contention that the gift was made in 1935 just before your father left for Japan?

A. Well, there wasn't any written gift but—papers—but he had told me many, many times before that that he would give me the properties.

Q. You testified on cross-examination before that your father supported you and your wife and four children in Japan for five years. Did you ever pay him that money back? A. No.

Mr. Gross: That's all.

Mr. Kashiwa: You worked for your father, did you?

The Witness: I worked for my father.

Mr. Kashiwa: That's all.

The Court: All right. You are excused.

(Witness excused.) [222]

Mr. Kashiwa: That is our case, your Honor.

Mr. Gross: If the Court please, I've got two men who are employed by governmental offices here, and I believe I can dispose of them very quickly. And if it looks like it is going to be very long—I think we can dispose of our case——

The Court: All right.

Mr. Gross: Mr. Makinney, would you take the witness stand, please.

KENNETH MAKINNEY

a witness on behalf of the Defendant, being duly sworn, testified as follows:

Direct Examination

The Court: Will you please state your name, age, residence, occupation and citizenship?

The Witness: My name is Kenneth Makinney. My age is 40 years. I am a licensed abstractor of land titles.

The Court: And you reside here in Honolulu?

The Witness: In Honolulu.

The Court: You are a citizen of the United States?

The Witness: Yes.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

Mr. Gross: If the Court please, Mr. Kashiwa informs me that he is willing to stipulate that this

(Testimony of Kenneth Makinney.)

document which I was going to hand the witness and ask him to examine, that he [223] prepared as an abstractor of titles, which the witness prepared with reference to this piece of real estate.

Mr. Kashiwa: It is not an abstract of title.

Mr. Gross: It is a certificate of title of real estate. And if he is willing to admit this into evidence as such, then I will have no further questions from this witness.

Mr. Kashiwa: I will also stipulate that this covers all of the property in dispute, including that little right of way.

Mr. Gross: Yes. It is dated 1944.

The Court: Very well. It may become, then, the Government's exhibit——

The Clerk: Government's Exhibit No. 1.

(The document referred to was received in evidence as "U. S. Exhibit No. 1.")

[Printer's Note: U. S. Exhibit No. 1 is set out in full at page 462 of this printed Record.]

The Court: You are excused.

(Witness excused.)

The Court: Unless you have some questions.

Mr. Kashiwa: Just a minute.

The Court: Mr. Makinney, just a minute.

(Witness recalled.)

(Testimony of Kenneth Makinney.)

By Mr. Kashiwa:

Q. Mr. Makinney, this certificate is only as to what you know from the search of the title in the Bureau of Conveyances?

A. And also the other offices as mentioned in the first paragraph of the certificate.

Q. Those are——

A. Supreme Court and Circuit Court of the First Judicial Circuit, Tax Assessing Registrar of Conveyances.

Q. This certification is only on reliance of those records? A. That's correct.

Q. And any other claims, if there are any, you don't certify to?

A. Not unless they are shown here, and there are no other claims as shown by the indexes in these various offices.

Q. In other words, if there are any other claims not recorded, you wouldn't know about them?

A. That's correct.

Q. And you would not certify?

A. They wouldn't be revealed by the record in these offices.

By Mr. Gross:

Q. Mr. Makinney, how long have you been a licensed abstractor?

A. Since the passage of the statute in 1929 or a year after that in 1930 I took my examination.

Q. Will you examine the Government's Exhibit 1 in evidence and state whether that is the type of certificate which is issued, which is usually relied

upon in real estate transactions [225] in the Territory of Hawaii? A. It is.

Mr. Gross: That's all.

The Court: You are excused.

(Witness excused.)

The Court: Next witness.

THEODORE W. T. KAM,

a witness on behalf of the Defendant, being duly sworn, testified as follows:

Direct Examination

The Court: What is your name, age, residence, occupation and citizenship?

The Witness: Theodore W. T. Kam.

The Court: And your age?

The Witness: Thirty-four.

The Court: You live here in Honolulu?

The Witness: That's right.

The Court: What is your occupation?

The Witness: Accountant-Administrator for the Territorial Tax Office.

The Court: And are you a citizen of the United States?

The Witness: Yes, I am.

The Court: Exclusively?

The Witness: That's right.

The Court: Take the witness. [226]

Mr. Gross: I gather that in the interests of saving time Mr. Kashiwa is willing to stipulate that the

(Testimony of Theodore W. T. Kam.)

documents which I hold in my hands, which have not been completely identified yet, but which consist of duplicate copies of tax bills for the years 1935 through 1947——

Mr. Kashiwa: Real property tax.

Mr. Gross: ——real property tax bills payable to the Territory of Hawaii, are true and correct copies, duplicates of the originals.

Mr. Kashiwa: And also the fact that the stamp mark of payment is shown on the side.

Mr. Gross: And that they may be admitted into evidence as exhibits.

Mr. Kashiwa: Yes. Of course, it is understood it covers this property in dispute.

The Court: That is what I understand.

Mr. Gross: That is what they are being offered for.

The Court: All right. They may become exhibit——

The Clerk: U. S. Exhibit No. 2.

The Court: “A” to what? Has anyone any further questions of this witness? You are excused.

(Witness excused.)

The Clerk: “2-A” to “2-M.”

(The documents referred to were received in evidence as “U. S. Exhibits 2-A to 2-M.”) [227]

[Printer’s Note: U. S. Exhibits 2-A to 2-M are set out in full at pages 468 to 472 of this printed Record.]

The Court: Do all of those tax bills reveal that

bills were made—well, they speak for themselves. Let me look at them. They are all billed to Kaneichi Nii, the father.

Mr. Gross: That is correct.

The Court: All right.

Mr. Kashiwa: They are marked “paid,” your Honor.

The Court: All right. Any further evidence?

Mr. Gross: The only further evidence that the Government has at this time to offer is the admissions of fact which I’d like to read into the record. I think we can probably read this into the record as a matter of a few minutes. And that is our case.

The Court: Well, assuming that we can do that in a few minutes, are you going to be prepared to argue your respective cases this afternoon?

Mr. Kashiwa: I am ready, your Honor.

The Court: In which event, then, why not adjourn for the noon recess and finish up the loose ends, if any, that may be hanging around this afternoon?

Mr. Gross: As a matter of argument I am very frank to state that when the Court was discussing this will it stated the issues in this case so well that I just don’t feel there is anything that I can add. If you want me to try to highlight the evidence in the case, I will be glad to.

Mr. Kashiwa: Of course, your Honor, I am not prepared [228] to submit a written memorandum. I will follow that up with my argument.

The Court: All right. Discuss it in your argument. I will give you until two o’clock to orient

yourselves and be prepared. It will probably take five or ten minutes when we reconvene to get the additional stipulated facts into evidence, facts that are already in the record.

Mr. Gross: Yes.

The Court: All right, then, until two o'clock the Court will stand at recess.

(The Court recessed at 12:12 p.m.) [229]

Afternoon Session

Mr. Kashiwa: Your Honor, may I report to the Court at the present time that those photostats will be ready tomorrow morning. They are being done now.

The Court: Call the case.

The Clerk: Civil No. 837, Shoso Nii versus Tom C. Clark.

Mr. Gross: If the Court please, I have a witness here that won't take very long. Although he speaks English, he says he prefers to talk through an interpreter, and if Mr. Kashiwa has no objection we'd like to ask Mr. Adachi.

The Court: Well, I have objection, regardless of that. Didn't this man testify in English yesterday?

The Clerk: Yes, he did.

The Court: He testifies in English today. And he has previously been sworn. You are Mr. Mikami? You are the same Katsutoshi Mikami who heretofore has testified in this case, and you are under oath.

KATSUTOSHI MIKAMI,

a witness on behalf of the Plaintiff, was recalled and testified further as follows:

The Court: I remind you that you are still under oath. You remember taking the oath?

The Witness: I no understand English very well, so I want an interpreter.

The Court: I know what you want, and what you are going to be allowed to do are two different things. You testified [230] yesterday in the best English that you could. I could understand you and you could understand that which was going on, and I see no reason why you shouldn't continue. But you remember taking an oath the other day, yesterday, I believe, to tell the truth? You remember that? You remember raising your right hand and swearing to tell the truth?

The Witness: Yes.

The Court: You are still under that same oath to tell the truth.

Mr. Gross: If the Court please, I would like some indulgence if possible. We may be able to get these by agreement.

The Court: May I interrupt to clear up something? The Clerk calls my attention to something. At the time this morning that the witness had the corporate books here of that Waipahu Garage and a stipulation was entered into, you undertook, as you mentioned, Mr. Kashiwa, to supply later photostats of the pages which were mentioned in the stipulation. The Clerk invites my attention to the fact that those photostats have not been offered in evi-

(Testimony of Katsutoshi Mikami.)

dence. So I will let the record show that when they are produced they will become part of that stipulation and may be given a marking by the Clerk.

Mr. Kashiwa: There will be two sets introduced. One is the dividends and one showing the endorsements on the stock.

The Court: All right. [231]

The Clerk: Do you want me to give them a number now, your Honor?

The Court: Yes, you can.

The Clerk: The endorsement on the stock will be Plaintiff's Exhibit "N" and the dividend payments will be Plaintiff's Exhibit "O."

(The documents referred to were received in evidence as Plaintiff's Exhibits "N" and "O.")

[Printer's Note: Plaintiff's Exhibits N and O are set out in full at pages 448 to 460 of this printed Record.]

Mr. Gross: If the Court please, Mr. Kashiwa has agreed that all of these documents may go in by stipulation, so if you would like to examine them, the Clerk can assign numbers to them.

The Court: All right. The documents may be received and marked by the Clerk as Government's exhibits. Are they in order there?

Mr. Gross: I think if we put them in chronological order, it will be best. I will do that for you.

The Court: What is the general label that you put on them?

Mr. Gross: These will all be letters addressed to the Alien Property.

(Testimony of Katsutoshi Mikami.)

The Court: By whom?

Mr. Gross: Three letters by Mr. Mikami and two letters by Mr. Kashiwa.

The Clerk: They will be U. S. Exhibits 3-A, 3-B, 3-C, [232] 3-D and 3-E; 3-A will be letter of October 27, 1947; 3-B is a letter dated December 3, 1947; 3-C is a letter dated February 11, '47; and 3-D is a letter dated March 25, 1948; and 3-E is a letter dated March 31, 1948.

Mr. Gross: 3-E has attachments to it, five sheets of attachments.

The Court: In lieu of the letters being by agreement received in evidence, you have no questions for this witness?

Mr. Gross: I was just going to have him——

The Court: Do you have any questions for the witness?

Mr. Kashiwa: Yes, I have. Oh, I guess not. That's all.

The Court: They aren't going to ask you any questions, so you are excused.

(Witness excused.)

(The documents referred to above were received in evidence as U. S. Exhibits 3-A, 3-B, 3-C, 3-D and 3-E.)

[Printer's Note: U. E. Exhibits 3-A, 3-B, 3-C, 3D and 3-E are set out in full at pages 473 to 485 of this printed Record.]

The Court: Anything further?

Mr. Gross: The only thing further, if the Court please, are those agreed admissions of fact which I would like to read into the record. They are right in the Court file.

The Court: They are to be found in the record in what document?

Mr. Gross: A request for the admission of facts, for the genuineness of documents filed—let me change that. It is a request for the admission of genuineness of documents [233] and requests for admission of facts pursuant to Rule 36 of the Rules of Civil Procedure filed September 9, 1948. The documents which were admitted have already been introduced in evidence by the Plaintiff. May we get the Court's indulgence again here? There is just a matter of my description here. We want to straighten this out before we read it. According to the admissions filed by the attorney for the plaintiff on September 13, 1948, in response to the request, the following facts are admitted. I am reading from page 4 of the original request.

"1. The facts that Kaneichi Nii, plaintiff's father, and a citizen of Japan, resided in Honolulu, Territory of Hawaii, for many years. In 1935, Kaneichi Nii returned to Japan and has resided in Japan until the present date. During his residence in Honolulu, Kaneichi Nii acquired certain property located at Waipahu, Oahu, Territory of Hawaii."

The property which is the subject matter of this law suit is described in the Vesting Order and in the

documents which have heretofore been admitted in evidence.

Mr. Kashiwa: That is all right.

Mr. Gross: "2. The facts that under date of January 2, 1933, Kaneichi Nii executed a Bill of Sale in favor of his son, Shoso Nii, the plaintiff herein, for, 'That certain store in Waipahu, aforesaid, known as "K. Nii Shoten" together with all of the automobiles, furniture, fixtures, goods, wares and [234] merchandise, books and accounts receivable, now being in and used in that certain store, aforesaid.' Said Bill of Sale was recorded in Liber 1205, Page 26, of record, on May 26, 1933, in the Office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii."

"The facts that under date of December 27, 1932, Kaneichi Nii purchased from T. Ota and Yasu Ota, his wife, a parcel of real estate located in Waipahu, Oahu, described in paragraph 1-2 above, (which property is the subject matter of this lawsuit) and the property was conveyed by deed dated December 27, 1932, from T. Ota and Yasu Ota, his wife, to Kaneichi Nii. The deed was recorded in the Office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii, in Liber 1189, Page 91, on December 27, 1932."

"4. The facts that under date of July 23, 1938, T. Ota and Yasu Ota, his wife, conveyed by deed dated July 23, 1938, to Kaneichi Nii, plaintiff's father, a parcel of real estate located in Waipahu, Oahu, and said deed specifically describes certain real estate which is the subject matter of this law-

suit and said deed was recorded on July 23, 1938, in Liber 1451, Page 418, of the records of the Office of the Registrar of Conveyances for the City and County of Honolulu.”

“5. The facts that by Vesting Order dated September 12, 1947, being Number 9777, the Attorney General of the United States as Successor to the Alien Property Custodian under the [235] authority of the Trading with the Enemy Act, as Amended, vested the parcels of real estate referred to in paragraphs II-3 and II-4 above as property of Kaneichi Nii, a resident and a national of Japan. At the time that the Vesting Order was filed in the Office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii, record title to the said real estate was in Kaneichi Nii.”

“6. The facts that Shoso Nii, the plaintiff herein, and son of Kaneichi Nii, was born in Waipahu, Oahu, on January 3, 1914, and left the Hawaiian Islands for Japan in July, 1941. Shoso Nii lived in Japan during all the intervening period from July, 1941, and returned to the Territory of Hawaii on November 8, 1947. On January 5, 1948, the plaintiff filed the instant suit under Section 9(a) of the Trading with the Enemy Act, as Amended, and alleged among other things:

‘That the plaintiff’s father is Kaneichi Nii; that said Kaneichi Nii is a citizen of Japan and has been continuously residing in Japan since May, 1935, to the date hereof; that prior to on or about May, 1935, said Kaneichi Nii resided for a long period of time at Waipahu aforesaid and operated a general mer-

chandise store known as the "K. Nii Store" at Waipahu, aforesaid; that due to his business ability, hard work and thrifty habits said Kaneichi Nii acquired considerable real property holdings in Waipahu aforesaid and accumulated a sizeable estate for himself; that in May, 1935, said Kaneichi Nii [236] decided to retire from active business and returned to Japan; that at the time he returned to Japan he left and gave by way of gift everything he left in the Territory of Hawaii to his only son, the plaintiff herein; and that the general merchandise store was turned over to the plaintiff by a duly executed bill of sale."

That was a quotation from the pleadings, if the Court please.

"7. The facts that in paragraph VII of the complaint filed in this lawsuit it is alleged:

'That with relation to the real property aforedescribed in paragraph VI although it was orally given to the plaintiff, there was never a deed executed in favor of the plaintiff from his father.' "

"8. The facts that as of February 7, 1939, Kaneichi Nii and Saku Nii, his wife, father and mother respectively of Shoso Nii, the plaintiff herein, executed before William C. Affelt, Jr., Vice Consul of the United States at Kobe, Japan, their respective powers of attorney running to Shoso Nii, the plaintiff, which powers of attorney are recorded in the Office of the Registrar of Conveyances for the City and County of Honolulu, Territory of Hawaii, in Liber 1503, Pages 190 to 197, inclusive."

"9. The facts that in the examination of the

plaintiff, conducted on July 22, 1948, pursuant to Rule 26 of the Rules [237] of Civil Procedure for the District Courts of the United States, the plaintiff Shoso Nii testified under oath as follows:

‘Q. When you were over in Japan with your father from 1941 to 1947, did you at any time tell him that you had found out the title of this real estate was not in yourself? A. No, sir.

‘Q. You did not? A. No.

‘Q. And why didn’t you?

‘A. Because I didn’t find any necessity in the name being changed.’ ”

Mr. Kashiwa: Your Honor, except for one correction.

Mr. Gross: There is this addenda to this, that the property acquired in 1938 from Ota and his wife was not acquired while Kaneichi Nii was a resident of Honolulu. He was in Japan at the time that the property was acquired. But the deed was made out to him.

If the Court please, that is the Government’s case.

The Court: Do you have a counter-claim in this matter?

Mr. Gross: Yes, if the Court please.

The Court: No evidence being offered as to that?

Mr. Gross: Yes, this exhibit here.

The Court: Exhibit 3-A to D relates to the counter-claim?

Mr. Gross: Yes, your Honor. [238]

The Court: All right. The only thing that I can think of, unless you have some rebuttal that you want to offer——

Mr. Kashiwa: No, your Honor.

The Court: The only thing that I can think of that is hanging fire is that will. And before hearing your argument upon the whole case, have you any of those will cases you want to call my attention to before I rule on that offer? Now just limit yourself to that offer. I don't want to hear your argument on the whole case now. That is Exhibit 1 for identification.

The Clerk: Plaintiff's 1 for identification.

Mr. Kashiwa: Your Honor, all I have to cite is 49 American Jurisprudence, page 642, paragraph 333 with relation to it.

The Court: Paragraph what?

Mr. Kashiwa: 330.

The Court: 330?

Mr. Kashiwa: It has a notation of the entire matter of the statute of frauds. And the question is, under the title, what is a memorandum?

The Court: Oh, I am satisfied that a will would form or fall into the category of a memorandum. I am not bothered about that. What bothers me is some of the things I mentioned this morning: One, was it ever intended by the man who wrote it to be effective for any purpose until he died? Nobody is [239] supposed to see this thing until he died.

Mr. Kashiwa: Your Honor, I know a lot of people that don't mind having their will seen, and especially in this case, the only son. Give it to the only son. It is right in the open safe. He can look at it. No objection.

The Court: That's what you say.

Mr. Kashiwa: As far as your Honor is ethically

concerned, if there is any way to communicate with Mr. Kaneichi Nii, if he wired him today he will say it is perfectly all right.

The Court: I don't doubt it.

Mr. Kashiwa: So that is the position I take. He brought it into my office. He showed it to me. And if this will, your Honor, is in somebody else's possession, I can subpoena that and have it brought into this Court and introduce it in evidence. I am sure about that.

The Court: Well, it is here. We don't have to worry about that other party. I have my doubts on that. Well, what is this American Jurisprudence reference that you have cited, what does it have to say?

Mr. Kashiwa: The entire matter on the subject of wills as being a memorandum is discussed in that whole paragraph.

The Court: Let me have it.

Mr. Kashiwa: I brought so many books, your Honor, from my library——

The Court: 49 American Jurisprudence. (To the Bailiff.) [240] Will you go through here and get it.

Mr. Kashiwa: The subject matter discussed therein, there are divided lines of authority. The Kansas case which I cited to your Honor holds that if there is an agreement to devise that these wills may be brought in as memoranda, although the contents of that will do not relate to, do not recite any prior agreement. Now, some of the cases hold that there must be a referral to that agreement. Now there is a dividing line of cases. And it is my contention that here in the Territory of Hawaii, if your Honor

has gone through those cases which hold the memorandum to be sufficient, very little is necessary to hold a memorandum sufficient here in the Territory. Now, I think that the better line of authorities, your Honor, is that—of course, there is another matter, a secondary matter which your Honor dealt with, where there is a revocation, that under the authorities cited in American Jurisprudence you cannot introduce the prior will. But the authorities further cite that if in case it is a defectively made will, then that may be introduced as evidence.

This is under the statute of frauds. What is a sufficient memorandum? The subject of wills is covered.

“Wills.—An instrument in the form of a will may itself constitute a written offer by the testator to sell land and as such be binding under the statute, on its due acceptance by the purchaser.” [241]

We are not involved in that.

“We stated elsewhere, an agreement to devise land is within the provisions relating to contracts for the sale of an interest in land, and an agreement to leave personal property is within the provision relating to the sale of goods, etc.—”

It says “and so forth”.

“According to some authorities, if a will is in fact executed by the promisor, in pursuance of the agreement and referring thereto, this constitutes sufficient written evidence of the oral agreement to take it out of the operation of the statute, since such an instrument is dual in its character; that is, it is partly contractual and partly testamentary, especially where the will is delivered to the promisee as

evidence of and in compliance with the agreement. It has been held in a number of cases that where a will, executed by the party to be charged pursuant to a verbal agreement as to the disposition after death of property owned by him, recites the terms of the agreement, it is a sufficient memorandum in writing to satisfy the statute, although never delivered, and irrespective of its validity or continued existence as a will. However, the rule that a will constitutes a sufficient memorandum to take an agreement to bequeath property out of the statute of frauds is subject to limitations in these respects in some jurisdictions. It is held that an unexecuted will does not satisfy the requirement of the statute for a memorandum, notwithstanding services have been performed in reliance upon the contract, and that the statute of frauds is not satisfied by a will made pursuant to an oral agreement to devise lands, where the will is subsequently revoked. It has been held in England that an unattested will is not sufficient to take a verbal promise to devise land out of the statute.

“According to some authorities, if the will makes no reference to the oral agreement and its possession is retained by the promisor, although it may have been made in pursuance of the agreement, it will not constitute a sufficient written memorandum thereof to take the agreement out of the operation of the statute. The view is that a potential factor in furtherance of fraud would be engendered were a will containing a simple bequest per-

mitted to operate as evidence of a binding contract to make such a bequest.

“The loss of a will constituting a memorandum of an oral contract to leave property to another does not render the contract unenforceable.”

And in the footnote:

“It is deemed immaterial that the instrument executed by the promisor is ineffectual as a will due to informalities in its execution.

“A will for some reason ineffective upon the death of the [243] testator, which makes no mention of the terms of the contract in pursuance of which it is alleged to have been executed, is insufficient to serve as memorandum of such contract.”

Now, your Honor, I cited these two Kansas cases because they expressly hold that in Kansas you don't have to so recite it in the agreement.

The Court: We have no specific authority here in Hawaii other than the case you cited to me, the one from Hilo.

Mr. Kashiwa: *Vierra versus Shipman*, 26 Hawaii 369.

The Court: That is the closest that our jurisdiction has ever come.

Mr. Kashiwa: The court refused to review that question.

The Court: Well, I am still bothered by this thing. How is it relevant to your theory of the case? You claim, and your star witness testified, that the gift was made. Now, if it was made, it seems to me that what you are trying to do by this offer is to establish a promise to do what your witness says was done.

Mr. Kashiwa: Yes, your Honor. This is it. A gift was made. But that gift, your Honor, we admitted there was no executed deed; it was an oral gift of real property, which I will show is perfectly possible under the decisions. Now, in order to substantiate that, your Honor, there is evidence that he intended to make a gift of that nature. I cannot let my case stand on just evidence that a gift was made. I think [244] it is wise procedure for any counsel to substantiate his evidence with actual facts of what happened. And this will substantiate the prior promise when this boy quit school. And that promise was made and he relied on it. And true enough, the father had a will to satisfy one side of the promise. And he did perform it. But, your Honor, there is such a thing as denial of a gift. A gift is denied in this case by a general denial, specific denial. It is my contention that we have the right to prove that there was a gift made, and in order to corroborate that evidence, your Honor, we can produce other evidence to show that there was such a thing; and especially where there is a lot of this testimony that is parol, your Honor, whenever we can introduce written evidence to show credence to that testimony, your Honor, I think that particular document should be received.

The Court: In other words, you are offering this will as a written document supporting the existence of the promise that you claim was made by the father to the son?

Mr. Kashiwa: Yes. And then there was an execution of that promise. But to show that there was

such a promise to begin with, I am introducing this evidence as circumstantial evidence to corroborate the entire situation there, your Honor. It has been a very difficult case for me to prove, your Honor. It is a thing which happened many, many years ago. And here there is a will which was signed; one of the witnesses testified [24] as to the father's signature. Now, without this will—well, if he was going to give it to you when he died, well, it won't go to you, it would go to all the children. There would be no use of his working after he finished school, working over there when the father didn't make a will, your Honor. Of course, the promise was partially executed when that store was transferred. He became 20 years of age. And I believe that there is nothing to prevent a prior execution of the promise of that nature. The store was given to him.

Your Honor, it has been a very difficult case to prove all this by parol; that happened many, many years ago. And there was this parol, it is our contention, this parol promise, your Honor. And this helps our case a great deal.

The Court: Well, certainly if this Exhibit 1 for identification made reference to this promise, it would be much stronger evidence than it is standing silent.

Mr. Kashiwa: But I have cited that Kansas case. Some courts allow it, your Honor. And it seems to me where the background is supported not only by this particular will but other specific acts in addition to the parol testimony, corrobo-

rating the entire situation, your Honor, it is my contention that that should be allowed.

The Court: It is very, very novel. Anything else you want to say?

Mr. Gross: If the Court please, I think one of the [246] significant things that——

The Court: Before you say anything, let me say this for guidance: As I now understand it, and see it perhaps a bit clearer than I have previously, this will which is offered—as to which one of the witnesses has identified the father's signature—is offered not to prove anything, as I understand it, save and except that it tends to prove the existence of the promise which the Plaintiff has testified to as having been made to him by his father under the facts and circumstances outlined in his testimony. Right?

Mr. Gross: Well, I think if we keep in mind two things: if we will consider all of the written documents, documents which were made at the time when there was no law suit pending and people were not trying to create an impression—we'd get a little better perspective if we keep the dates in mind. This will is dated prior to the time of the real estate, prior to the time the real estate was acquired, which is the subject matter of this law suit. So if the theory of the Plaintiff in this law case is that this will is a memorandum of a promise to give this real estate to the Plaintiff, then obviously the will is dated prior to the time the title to the real estate was acquired.

The Court: I don't understand it to be offered

to prove that. That bothered me this morning. But I don't now understand it to be offered for that purpose. [247]

Mr. Gross: Well, what is the offer?

The Court: To prove the promise.

Mr. Gross: To prove a promise? Well, the plaintiff's theory of this law suit is not that there was a promise but there is an executed promise.

The Court: Well, that is another leg of contention.

Mr. Gross: That the gift was actually made in 1935.

The Court: That I believe to be his contention. But at the moment this is offered, if I now understand it clearly, simply to prove the promise as outlined by the Plaintiff in his testimony, is that right?

Mr. Kashiwa: Yes, your Honor.

The Court: And only that. Now, in another phase of his case he says that under that promise this particular part of the promise did not become effective because the other part became effective since the father went to Japan and the man actually made the gift to the son. But this simply tends to prove, he says, that there was this promise with the two alternatives, one, that something would happen if the father went permanently to Japan, and, two, this if he died.

Mr. Gross: Well, if the Court please, I think I have stated our position.

The Court: But I am not too sure you are meeting the basis on which it is offered.

Mr. Gross: Well, I am trying to confine this thing to [248] the issues which are before this Court, namely, that in 1932 the Plaintiff's father acquired a piece of real estate, and record of title of that real estate remained in the Plaintiff from 1932 until 1947; that in 1938 a right of way adjoining the real estate was acquired in the name of the Plaintiff. We vested this.

Mr. Kashiwa: In the name of the father.

Mr. Gross: In the name of the father, rather; the same person who had acquired in 1932. We vested this real estate. The Plaintiff comes in and says: You vest that real estate as the property of Kaneichi Nii; that is not the real estate of Kaneichi Nii; that is the real estate of Shoso Nii; my father gave it to me. And in his pleading he stated that his father gave it to him in 1933, after that will was executed. And then on his testimony, after he had had an opportunity to examine what had developed in the Court and in the preliminary motions, he changed his testimony to state that his father gave him the real estate in 1935. And then when his father was asked last month of this year about the real estate, his father says he didn't give it to him; he gave him a power of attorney.

The Court: Well, those are other phases of the case that don't relate to this offer.

Mr. Gross: Now, one minute after the ink was dry on that paper, that will could be ineffective as a memorandum. [249]

The Court: By—

Mr. Gross: By the father simply writing "cancelled" across it or drawing another will.

The Court: But in the absence of evidence to that effect, am I not entitled to presume that it is still effective?

Mr. Gross: This is not a probate proceeding, if the Court please. This is a suit under Section 9 of the Trading with the Enemy Act.

The Court: But here is at best a memorandum with the father's signature on it.

Mr. Gross: The memorandum does not specifically refer to this real estate.

The Court: Right.

Mr. Gross: It refers to all of his property. And the Court in its wide experience learned that all fathers hope that the time will come, I suppose, when we can either to one or more than one son make a document which is very much like that, perhaps a little bit longer, hoping we will have more property, let us say, or less property.

The Court: Or more.

Mr. Gross: That seemed to take care of quite a bit of property, too. I cannot see under any theory of the case—Mr. Kashiwa rightly tries to keep two strings to his boat. If his theory is that this was a memorandum of a promise, it was made before the man even acquired the property which we [250] are talking about; and the memorandum doesn't even refer to the property. I don't believe he will find any case in which they say that just a general memorandum—there must be something specific.

The Court: You are touching, as I get it now, on this proposition that where I have a piece of property and promise you that I will give it to you or sell it to you or convey it to you, unless I sign my name to some written piece of paper identifying that promise, you can't do anything about getting it.

Mr. Gross: Well, a court, this Court must be able, by referring, be able to say it refers to a particular piece of property.

The Court: That isn't what I am trying to get at. With reference to the Plaintiff's theory here that there was a promise, I get a glimmer of the fact that you are contending that even if that promise did exist, even if this document were in evidence of that promise, that it could have no effect upon the property which is the subject matter of this dispute because the property involved was not at the time of the promise owned by the father.

Mr. Gross: That's right. And that subsequently after the property was acquired the acts of the father indicated a contrary intention.

The Court: That may be. [251]

Mr. Gross: Well, I think you have to eliminate the possibility that he was making a promise to acquire, to attach, to acquire property. And I wonder whether under the law of contracts or gift or whatever it may be that two parties—and the Plaintiff at that time I think was an infant, but we will not discuss that because I don't think it is relevant—two parties can make a promise with reference to

a piece of real estate that is not in existence as far as the two parties are concerned. Can I promise to give you something that I don't own except in general terms? If his father said to him, "Son, I am going to buy that property over there and when I get it I am going to give it to you," then I think—and he had described that out in the will or had said including property that I am going to buy, then I think you have got a different proposition. But how can I make a memorandum of an agreement to give something I don't own?

The Court: Well, again Mr. Kashiwa would say to you, don't concentrate on that, for the only purpose for which I am offering this is to prove that there was a promise made to give to the son at some time in the future whatever the father had in Hawaii; and that that gift, that promise of a gift of such property had as a due date or due dates, one, either the time when he left permanently for Japan or, two, when he died. Now, I repeat, Mr. Kashiwa isn't contending that this exhibit for identification proves the gift. It simply proves the [252] nature of the promise.

Mr. Gross: I don't believe it even does that.

The Court: Well, that at best——

Mr. Gross: I don't believe it even does that. I think it is a standard form of will which your Honor, Mr. Kashiwa and myself and all the other counsel in the courtroom are thoroughly familiar with. It is known, as some client of mine calls it, a one-page will; they want to get it all on one page so that it is short and simple and it is the

natural will which a Japanese father would make out for his only son. And you had the additional facts that in 1933, in spite of the fact that he had made out this will, that he still made a bill of sale. He didn't think that this was a sufficient memorandum to take care of the store.

The Court: Oh, no. This would only be of some importance as a memorandum to take the case out of the statute of frauds if the son had some basis of suing the father on the promise to give.

Mr. Gross: That is where I think Mr. Kashiwa has confused, I think, the issues here. This is not a suit for specific performance. This is not a suit for breach of contract. This is not a suit to declare constructive trust.

The Court: But let me interrupt. In sum and substance again he is offering this as evidence that the Plaintiff's story, the Plaintiff's testimony as to his promise isn't made [253] out of thin air. The Plaintiff has said, my father said this and here is some evidence of the fact that he did act in accordance with the promise that he made to me. It bolsters up the Plaintiff's testimony.

Mr. Gross: I can't see that it is admissible under any theory. It is a will that would ordinarily be in the possession of the person that made it. It is ambulatory. As I stated before, it is no longer effective. After the ink is dry, after writing a sentence, I hereby cancel this will under such date, some such writing like that. And if it is being introduced for the purpose of showing a chain of events, if that is what we are talking about, a

chain of events, I remind the Court that this is not a suit for specific performance, this is not a suit to establish a constructive trust, this is not a probate proceeding. But the Alien Property Custodian has filed a vesting order in which it is found that certain real estate is the property of Kaneichi Nii. The Plaintiff comes in and says it is not the property of Kaneichi Nii, it is my property, he gave it to me; and then on the stand the Plaintiff states further, he gave it to me in 1935 just before he left for Japan, orally. Now, if the Plaintiff's father gave him the real estate—that's all there is to it. Then he doesn't need this. If he didn't give him the real estate, then this is immaterial anyway.

The Court: I can't at the moment see the materiality of [254] it other than as corroborating the testimony of the Plaintiff, and I gather that finally is the sole basis on which it is offered—right?

Mr. Kashiwa: Yes, your Honor.

The Court: For that purpose and that purpose only, as corroborating the testimony of the Plaintiff in respect to the promise that his father made to him, for that limited purpose, I repeat—I am not admitting that it is or isn't a sufficient memorandum to take the case out of the statute of frauds or sufficient document to constitute a will under the laws of the Territory of Hawaii—I will receive it for that limited purpose, corroborating the Plaintiff's testimony. It, therefore, may become, Mr. Clerk—

The Clerk: Plaintiff's Exhibit "P."

(The document referred to was received in evidence as "Plaintiff's Exhibit P.")

[Printer's Note: Plaintiff's Exhibit P is set out in full at page 461 of this printed Record.]

Mr. Kashiwa: May I substitute the copy?

The Court: Yes.

Mr. Gross: Is it satisfactory to the Court if Mr. Adachi and Mr. Nii should prepare that? I think that should be letter perfect, the document.

The Court: I understood that there had been some comparison of the copy.

Mr. Gross: Let them step outside to prepare our copy. It should be letter perfect. I don't think it is necessary [255] for me to take an exception on the ruling of the Court on the admission of the will.

Mr. Kashiwa: It is an equity case.

Mr. Gross: Under the rules it is assumed that all rulings are excepted——

The Court: If there should be any doubt about it.

Mr. Gross: May the record show that I am taking an exception to the ruling.

The Court: Did somebody say that this was an equity law?

Mr. Kashiwa: Section 9(a).

The Court: All right. Now the evidence stands submitted on both sides. All the loose ends have been tied up. There is going to be no motion to reopen or anything?

Mr. Kashiwa: One motion, your Honor. The original petition—the amended complaint which I filed on the day of the trial, yesterday, I ask leave of this Court to be permitted to file that complaint, your Honor.

The Court: Now?

Mr. Kashiwa: Now.

The Court: Why?

Mr. Kashiwa: Under Rule 15 I am permitted, to meet the evidence in the case, your Honor. My contention is that it should be amended to meet the——

The Court: I can't see anything in your amended complaint which I have ruled on at the inception of the trial that, as [256] you tell me, changes the theory of your case one iota, but does in the amended complaint set forth certain facts and factors which you have proven. And to me it is out of order to plead evidence on the complaint. I am going to, therefore, on the theory that you are neither harmed nor prejudiced by the denial again deny your motion to amend the complaint.

Mr. Kashiwa: Yes, your Honor.

The Court: All right. We are ready for final argument.

Mr. Gross: For the purpose of the record I'd like to make a motion for a directed finding at the close of all the evidence.

The Court: A directed finding?

Mr. Gross: A directed finding in favor of the Defendant, on the complaint and answer, at the close of all the evidence. I should also like to

make a motion for a directed finding at the close of all the evidence on the counter-claim of the Plaintiff and the counter-Defendant's answer thereto.

Mr. Kashiwa: This, your Honor, is not a jury trial. Direct whom?

The Court: Well, whatever it is,—I am not sure I understand it completely either—but the same arguments that you are going to make basically are going to be made on the motion. So I will hear both of them together, unless you want to be heard.

Mr. Gross: No, I just wanted the record to show—— [257]

The Court: I will reserve my ruling on that and examine it later. All right, Mr. Kashiwa, let me hear your opening argument. Let me see the complaint, Mr. Clerk. I want, before you go very far in your argument, to review the allegations of the complaint and tell me wherein you believe you have proven the allegations.

(Mr. Kashiwa presented his opening argument on behalf of the Plaintiff.)

December 1, 1948

(Mr. Kashiwa continued with his opening argument on behalf of the Plaintiff.)

(Mr. Gross presented his argument on behalf of the Defendant.)

(Mr. Kashiwa presented his closing argument on behalf of the Plaintiff.)

The Court: I do not feel in this matter that I need the assistance of legal briefs, for two reasons: one, the Plaintiff here has the burden of convincing the Court by preponderance of evidence that the allegations of the complaint are true and correct, by a preponderance of credible evidence. Ingenious as is the legal theory upon which the Plaintiff bases his case, the proof that has been adduced by the Plaintiff does not bring conviction to my mind that in fact a gift of this real property was made to him by his father. [258]

Secondly, assuming that an equitable gift of the property was made by the father to the son in 1935, the acts and actions of the father subsequent to that date do not support the Plaintiff's contentions. Indeed, the father testifying in this case does not in the slightest degree corroborate the Plaintiff's contentions here made. Over and beyond that, the acts of the father and of the Plaintiff himself during the years '35 to '47, at which time the Custodian vested the property, are contradictions of the theory here advanced.

I am satisfied that the father was an intelligent person, though he may have been uneducated, and did well in his business at Waipahu; and, as has been pointed out, he knew what to do when he wanted to effectively dispose of property, for prior to going to Japan in 1933 he properly and duly executed a bill of sale to the store in favor of his son. And I am certain that preparing to go to Japan permanently, if he had promised his son, as the son contends, that prior to leaving he cer-

tainly would have taken steps to execute the proper deed of the real property in Hawaii to his son; he certainly knew how to execute a will to take care of the disposition of his property after death.

Further, in 1939, though he here now claims the property was equitably his since 1935, the son conferring first apparently with someone here in Honolulu who purported to advise him legally, the son asked the father not for a deed to the property [259] which he claimed was given to him but rather for a power of attorney from the father and the mother to deal with the parents' property here in Hawaii.

All of those facts and factors which I have outlined lead me to the conclusion that the Plaintiff has not substantiated by credible proof the allegations of the complaint. And further, assuming that he had, I am still satisfied, as indicated in my Fujino decision, that the Alien Property Custodian with respect to real property stands in the position of a purchaser for value and is protected by the recording statute of the Territory.

Those being my conclusions and findings, the Court will approve findings of fact and conclusions of law consistent with this outline of my opinion and will sign them upon presentation, and will include an order previously held up directing the Plaintiff to turn over to the Custodian the rents that have come into the Plaintiff's possession since the time when the Plaintiff collected the rents from his father's property. In other words, the turn-over directive that heretofore has been denied will at this time be granted. And I will sign an order to that effect on presentation.

Mr. Kashiwa: Your Honor, at this time, for the purpose of the record, may I except to your Honor's oral decision as being contrary to the facts and law, and at this time I wish to note an appeal to the 9th Circuit Court. [260]

The Court: Very well. The record may note that fact, those facts.

Mr. Gross: I gather that the Court would like us to prepare findings of fact.

The Court: Prepare the findings of fact and conclusions of law, and I will in all probability reduce my oral opinion to writing.

(The Court adjourned at 11:00 o'clock a.m.)

REPORTER'S CERTIFICATE

I, Albert Grain, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify as follows: that the foregoing is a true and correct transcript of proceedings in Civil No. 837, Shoso Nii vs. Tom C. Clark, held in the above-named court beginning with November 29, 1948, before the Hon. J. Frank McLaughlin, Judge.

Feb. 10, 1949.

/s/ ALBERT GRAIN.

[Endorsed]: Filed Feb. 10, 1949.

PLAINTIFF'S EXHIBIT "A-1"

(Claimant's Copy.)

United States of American
Office of Alien Property Custodian

NOTICE OF CLAIM FOR RETURN
OF PROPERTY

Note.—All answers to questions on this form (except names and addresses) must be in English. Amounts of money must be stated in dollars. Copies of documents must be accompanied by English translations. This notice is repeated below in French and German.

Avis: Toutes les reponses aux questions ci-dessous doivent etre faites en anglais, sauf en ce qui concerne les noms et adresses. Le montant des sommes doit etre indique en dollars (Etats-Unis). Une traduction en anglais doit etre jointe a chaque document.

Zur Kenntnissnahme: Alle Antworten auf die Fragen auf diesem Formular (mit Ausnahme von Namen und Adressen) müssen in englischer Sprache gegeben werden. Geldeträge müssen in Dollars (Amerikanische Währung) angeführt werden. Falls Abschriften von Schriftstücken unterbreitet werden, müssen Übersetzungen in englischer Sprache beigelegt werden.

Please read the accompanying explanation and instructions before filling out the form:

1. (a) Claimant's name, Shoso Nii. (b) Address, P.O. Box 416, Waipahu, Oahu. (c) Has claimant filed any other form claiming the same property? No.

* * * *

Plaintiff's Exhibit "A-1"—(Continued)

2. (a) Claimant's agent(if any), Attorney Shiro Kashiwa. (b) Agent's address, 307 Hawaiian Trust Bldg., Honolulu 48, T. H. (c) Is agent authorized to receive payment of money or delivery of property, if returned? No.

* * * *

3. Fees for prosecuting this claim: I have promised to pay Attorney Shiro Kashiwa a sum much less than 10% of the value of the property claimed as fee. Part of this has been paid.

4. Value of property claimed: Approximately \$30,000.00.

5. Payments for material or services supplied, or patents licensed, to or for the United States Government: None.

6. Vesting order by which the Alien Property Custodian acquired the property (if known): No. 9777.

7. Identification of property claimed: See attached supplement Exhibit A.

8. Are claimant's rights in the property subject to any condition or encumbrance? No.

9. Characterization of claimant.—Answer this item by filling out schedule 9A or 9B. If the claim is filed by an individual, fill out schedule 9A, describing him. If the claim is filed by a group of individuals (such as co-owners or partners), fill out a separate schedule 9A for each member of the group. If the claimant is a corporation or association, fill out schedule 9B.

Owner of property on vesting date.—

(a) Give the vesting date. September 12, 1947.

(This means the date when the Alien Property

Plaintiff's Exhibit "A-1"—(Continued)

Custodian took over the property which you are now claiming. If you do not know that date, use the approximate date on which your property was taken, followed by the word "approximately." If you do not know even the approximate date, write "December 7, 1941," and use this as the vesting date in answering questions in this item and in item 11.)

(b) Check the one of the following statements which applies to your claim:

[X] (1) The claimant was the owner of the property on the vesting date. See Exhibit B.

.... (2) The claimant is the legal representative or successor of an individual who owned the property on the vesting date.

.... (3) The claimant is the legal representative or successor of a corporation which owned the property on the vesting date.

(If you checked number (1) above, do not use schedules 10A or 10B, but go directly to item 11. If you checked number (2) above, fill out schedule 10A. If you checked number (3) above, fill out schedule 10B.)

11. Chain of title to property.—Describe below the last transfer of title to the property. (Omit any transfer already described in Schedule 10A or 10B.)

(a) Date: On or about May 5, 1935.

(b) By whom transferred: Kaneichi Nii.

(c) To whom transferred: Shoso Nii.

(d) Nature and terms of transfer: Gift under principle of equitable transfer of property by way of gift and by way of adverse possession under the laws of the Territory of Hawaii.

Plaintiff's Exhibit "A-1"—(Continued)

(e) Consideration actually paid: None; to be paid: None.

(f) If officially recorded or registered, give citation: Due to the nature of the transaction it was not recorded.

If there have been any other transfers of the property since March 1, 1938, give the same information about these other transfers, using a supplement.

Attach a copy of each document of title, and of any contract pursuant to which a transfer was made, to each copy of your form. Photographic copies are preferred. If documents are in a foreign language, English translations must also be attached.

12. Other relevant information.—If there are any other facts of which you want to advise the Custodian, write them on a separate sheet of paper under the heading "Supplement to item 12." You may also attach copies of any documents not previously referred to, and mark them in the same way.

13. Affidavit.—The undersigned makes the following declaration under the penalties of perjury and false swearing:

(a) Check the one of the following statements which applies, and strike out the others:

[X] (1) I am the claimant named in item 1.

* * * *

(b) The facts set forth in the foregoing form and in all attached supplements and schedules are true, and all attached documents are true copies of the originals, to the best of my knowledge and belief.

(c) I have no knowledge of any fact called for by the foregoing form, schedules, and instructions which is not fully set forth.

Plaintiff's Exhibit "A-1"—(Continued)

(d) To the best of my knowledge and belief, the property claimed was not at any time after September 1, 1939, held or used pursuant to any arrangement to conceal any interest of an enemy of the United States.

Signature:

/s/ SHOSO NII.

Name of signer:

SHOSO NII.

14. Notarization.—The foregoing declaration was subscribed and sworn to (or affirmed) before me this 29th day of November, 1947.

(Seal) /s/ FLORENCE Y. OKUBO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires August 9, 1951.

Schedule 9A

(Supplementing Form APC-1A, Item 9)

(Claimant's copy.)

CHARACTERIZATION OF INDIVIDUAL
CLAIMANT

(a) Name: Shoso Nii; (b) Date of birth: 3rd, January, 1914. (c) Place of birth: Waipahu, Oahu, Territory of Hawaii. (d) If claimant has been outside the United States (including its Territories and possessions) at any time since December 7, 1941, give the name of each country in which he was present, and the principal address at which he stayed in that coun-

Plaintiff's Exhibit "A-1"—(Continued)

try, as follows: Country, Japan, from 28th, June, 1941, to 8th, November, 1947.

Note: Throughout the above period claimant was a resident of Waipahu, Oahu, Territory of Hawaii. He left for Japan in June, 1941, for a temporary visit and was unable to return until November 8, 1947.

* * * *

(e) Has the claimant transacted any business since December 7, 1941, personally or by agent, in Germany, Japan, Italy, Hungary, Rumania, or Bulgaria? No.

* * * *

If the claimant has ever been a citizen of Germany, Japan, Italy, Hungary, Rumania, or Bulgaria, answer also the following question (other persons do not answer):

Has the claimant transacted any business since December 7, 1941, personally or by agent, in territory occupied by any of these nations? No.

* * * *

(f) Claimant's present citizenship (name of country): United States of America.

Explain below how your citizenship was acquired—by birth, marriage, naturalization, etc., and give the date. Naturalized citizens should give the number of their naturalization papers. Stateless persons should cite the official act by which they were deprived of citizenship, and supply a copy if possible: By birth on January 3, 1914.

If the date given above is after December 7, 1941, explain below how your prior citizenship status was acquired:

Plaintiff's Exhibit "A-1"—(Continued)

[Printer's Note: Exhibit A is similar to Exhibit A, to Complaint, printed in full at page 13 of this printed Record.]

EXHIBIT B

Although the title of the property was in the name of Kaneichi Nii as of the date of the vesting order, the property was really the property of the claimant. The father in Japan gave the property to the claimant on or about May 5, 1935, when the father returned to Japan and because of such gift the claimant has collected all rents, paid all taxes, possessed the property and made improvements thereon. Claimant claims that under equitable principles in any court of equity the claimant is the real owner of the property. Claimant is also the owner of the property by way of adverse possession under the laws of the Territory of Hawaii. He held the property openly adversely against the entire world for more than 10 years after May 5, 1935.

PLAINTIFF'S EXHIBIT "A-2"

Office of Alien Property
Department of Justice, Washington, D. C.

January 26, 1948

Mr. Shiro Kashiwa
307 Hawaiian Trust Bldg., Honolulu 48, T. H.

Dear Sir:

The Office of Alien Property, Department of Justice, has received and placed on file the notice of the undernoted claim, as of the date of receipt stated.

Plaintiff's Exhibit "A-2"—(Continued)

The filing of the notice of claim does not, of course, constitute a determination of its nature or validity. All correspondence should hereafter bear the claim number indicated.

Inasmuch as a substantial number of claims are now pending, it is not possible at this time to state when any particular claim will be acted on by this Office. If any further action by the claimant is necessary in connection with consideration of the claim, the claimant will be so informed by letter addressed as above, and this Office will not take any final adverse action on the claim without transmitting notice of opportunity to be heard.

The Claim has tentatively been entered as follows on the records of this Office:

Claim No.: 31530; Name of Claimant: Shoso Nii;
Date of Receipt: December 2, 1947.

Vesting Order No.: 9777; Account No.: 39-26717;
Summary of Claim: Real property situated at Wai-kolo, Waipahu, Oahu, T. H. Certain debt owing to Kaneichi Nii, also known as Konichi Nii by Shozo Nii.

Very truly yours,

/s/ DAVID L. BAZELON,

Assistant Attorney General; Director, Office of Alien
Property.

Rec'd 2/10/48.

PLAINTIFF'S EXHIBIT "C"

Liber 1662, Page 293

POWER OF ATTORNEY

Know All Men By These Presents:

That I, Shoso Nii of Waipahu, City and County of Honolulu, Territory of Hawaii, have made, constituted and appointed, and by the presents, do hereby make, constitute and appoint Katsutoshi Mikami of Honolulu, T. H., my true and lawful attorney for me and in my name, place and stead, and for my use and benefit, to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interest, dividends, annuities and demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me; and have, use and take all lawful ways and means in my name, or otherwise, for the recovery thereof, by legal process, and to compromise and agree for the same, and acquittances or other sufficient discharges for the same, for me and in my name, to make, seal and deliver; to bargain, contract, agree for, purchase, receive and take lands, tenements, hereditaments, and accept the seisin and possession of all lands, and all deeds, and other assurances in the law therefor; and to lease, let, demise, bargain, sell, release, convey, mortgage and hypothecate lands, tenements and hereditaments; upon such terms and conditions, and under such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in

Plaintiff's Exhibit "C"—(Continued)

possession or in action; and to make, do and transact all and every kind of business of what nature and kind soever; and, also for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debts, and such other instruments in writing of whatever kind and nature, as may be necessary or proper in the premises.

Giving and Granting unto my said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, I hereby ratifying and confirming all that my said attorney shall do, or purport to do in the premises.

That I further empower and authorize Katsutoshi Mikami to employ and appoint attorney, agent, or employee to represent and or assist him to execute and carry out the foregoing powers.

In Witness Whereof, I have hereunto set my hand this 24th day of June, A.D. 1941.

/s/ SHOSO NII.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 24th day of June, 1941, before me personally appeared Shoso Nii, to me known to be the

Plaintiff's Exhibit "C"—(Continued)
person described in and who executed the foregoing
instrument and acknowledged that he executed the
same as his free act and deed.

(Seal) /s/ PHILIP M. NAGATORI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Entered of Record this 7th day of August, A.D.
1941, at 2:04 o'clock p.m. and compared. Mark N.
Huckestein, Registrar of Conveyances.

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B		
1. Source of income	2. Nature of income	3. Amount
		\$
	
	
	
	

(t) Personal Exemption

(b) Personal Exemption			Number of months during the year		Credit claimed	Name of dependent and relationship	Number of months during the year	Credit
Status	Number of months during the year in each status		Under 18 years old	Over 18 years old				
Single, or married and not living with husband or wife.....								
Married and living with husband or wife.....	11	\$ 15.00			Melanie Ann	10		\$ 4.00
Head of family (explain below).....								
Reason for support								

1. Total receipts (state nature of business or profession)..... \$ 211.

COST OF GOODS SOLD	
2. Labor	\$
3. Material and supplies	
4. Merchandise bought for sale	18111 18
5. Other costs (itemize below)	
6. Plus inventory at beginning of year	1607 15
7. Total (lines 2 to 6)	\$19738 98
8. Less inventory at end of year	1361 50
9. Net cost of goods sold (line 7 minus line 8)	\$18387 48

10. Salaries not included as "Labor" (do not deduct compensation for yourself).....	\$	87
11. Interest on business indebtedness.....		546 18
12. Taxes on business and business property.....		
13. Losses (explain below).....		
14. Bad debts arising from sales or services.....		
15. Depreciation, obsolescence, and depletion (explain in Schedule E).....		657 90
16. Rent, repairs, and other expenses (itemize below or on separate sheet).....		165 1 28
17. Total (lines 10 to 16).....	\$	2086 193
18. Total deductions (line 9 plus line 17).....		214
19. Net profit (or loss) (line 1 minus line 18) (enter as item 9, page 1).....	\$	36

Explanation of deductions
 claimed in lines 5, 13, and 16: Cost 510.00 Date EX 304.61 Sept 11 & 7th 27.16 cost & 9th 13.50
W. 11th 28.24 10th 12.00 11th 12.00 12th 12.00 13th 12.00 14th 12.00 15th 12.00

1. Kind of property (if buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis	4. Assets fully depreciated in year at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Dollar value
Auto & Trucks	1930-38	\$ 1851 -	\$ None	\$ 1330 -	\$ 520 -	5		\$ 3
Furn & Fix	"	2063 -	"	939.61	1123.39	10		2
Gas Engine	1936	116 -	"	23.20	92.80	10		6

↓ 6. Expense of sale | 7. Depreciation

RM 1040
 Treasury Department
 Revenue Service

UNITED STATES INDIVIDUAL INCOME TAX RETURN 1939

Page 1

(Auditor's Stamp)

Div. 837
 Plaintiff, Exh
 "D-2"
 Admitted
 1-29-48

FOR NET INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES,
 DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM
 OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1939

or fiscal year beginning _____, 1939, and ended _____, 1940

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third
 month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instruction C)

(Name) *Sharon New*
 (Use given names of both husband and wife, if this is a joint return)

Wagoner, 6400
 (Street and number, or rural route)

P. O. Box 1164
 (Post office)

(County)

(State)

DUPLICATE COPY

IMPORTANT



One duplicate copy
 must be filed with orig-
 inal return.

(\$5 will be assessed if
 duplicate is not filed.)

INCOME

Salaries and other compensation for personal services. (From Schedule A)

Interest on bank deposits, notes, mortgages, etc.

Interest on corporation bonds.

Dividend interest on Government obligations, etc. (From Schedule B)

Capital gain (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses).

Income from fiduciaries. (Furnish names and addresses):

Royalties and royalties. (From Schedule C)

Gain (or loss) from business or profession. (From Schedule D)

Short-term gain from sale or exchange of capital assets. (From Schedule F)

Long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)

Gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)

Income (including income from annuities) (State nature)

Total income in items 1 to 11. (Enter nontaxable income in Schedule I)

DEDUCTIONS

Contributions paid. (Explain in Schedule H)

Charitable contributions. (Explain in Schedule H)

Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule H)

Charitable deductions. (Explain in Schedule H)

Deductions authorized by law. (Explain in Schedule H)

Total deductions in items 13 to 18

Net income (item 12 minus item 19)

COMPUTATION OF TAX

Normal tax (item 20 above)

Personal exemption. (From Schedule J-1)

Exemption for dependents. (From Schedule J-2)

Surplus net income

Interest on Government obligations, etc. (See Instruction 25)

Adjusted income credit. (From Schedule K-1 or K-2)

Subject to normal tax

28. Normal tax (4% of item 27)

29. Surtax on item 24. (See Instruction 29)

30. Total (item 28 plus item 29)

31. Total tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F)

32. Less: Income tax paid at source

33. Income tax paid to a foreign country or U. S. possession. (Attach Form 1116)

34. Balance of tax (item 31 minus items 32 and 33)

Schedule A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES, AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See Instruction 1)

1. Name and address of employer and nature of income	2. Amount	3. Expenses (itemize)	4. A
	\$		\$
Total of column 2 minus total of column 4 (enter as item 1, page 1)			\$

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction C)

1. Obligations or securities	2. Amount earned at end of year including your proportionate share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Interest exempt from taxation	5. Interest (enter as item 1, page 1)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$	All	XXXXXX
(b) Obligations issued under Federal Farm Loan Act, or under such Act as amended			All	XXXXXX
(c) Obligations of United States issued on or before September 1, 1917			All	XXXXXX
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	XXXXXX
(e) United States Savings Bonds and Treasury Bonds			\$	\$
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above)			None	
(g) Total (enter as item 5, page 1)				\$

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 8)

1. Kind of property	2. Amount	3. Depreciation (explain in Schedule E)	4. Repairs (explain below)	5. Other expenses (itemize below)	6. Net profit (enter as item 1, page 1)
	\$	\$	\$	\$	\$

Explanation of deductions claimed in columns 4 and 5

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 9)

(State business name and address if different from name and address on page 1)		19	
1. Total receipts (state nature of business or profession)		19	
COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS	
2. Labor	\$	10. Salaries not included as "Labor" (do not deduct compensation for yourself)	\$
3. Material and supplies		11. Interest on business indebtedness	
4. Merchandise bought for sale	15365 09	12. Taxes on business and business property	967 15
5. Other costs (itemize below)		13. Losses (explain below)	
6. Plus inventory at beginning of year	1351 50	14. Bad debts arising from sales or services	
7. Total (lines 2 to 6)	\$ 16716 59	15. Depreciation, obsolescence, and depletion (explain in Schedule E)	446 23
8. Less inventory at end of year	1242 24	16. Rent, repairs, and other expenses (itemize below or on separate sheet)	1729 29
9. Net cost of goods sold (line 7 minus line 8)	\$ 15474 35	17. Total (lines 10 to 16)	\$ 3142 47
If the production, manufacture, purchase and sale of merchandise is an income-producing factor, inventories are required. Enter "C," "M," or "M." on lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.		18. Total deductions (line 9 plus line 17)	18
Explanation of deductions claimed in lines 5, 13, and 16		19. Net profit (or loss) (line 1 minus line 18) (enter as item 9, page 1)	\$

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G

1. Kind of property (if buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year
Auto + Trucks	1939	\$ 1200 00	\$ 1200 00	\$ 1200 00	\$ 1200 00	5	5
Auto + Truck	3-1-38	2063 00		939 61	1123 39	10	-
Auto + Truck	1936	116 00		23 20	92 80	10	6
Auto + Trucks	"	100 00		60 00	40 00	5	

Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

Page 4

2. Explanation	3. Amount	1. Item No. (Continued)	2. Explanation (Continued)	3. Amount (Continued)
Med. Ins. 223.61 D.P. 7.9549	\$	Eq 1 #13	Longway	\$ 14.26
Ins. 5.00 11.00 276.01			Auto. Insurance	5.50
Ins. 1.72 91 711 714 5.01			Life Ins.	2.00
Eq. 714 13.72 714 Eq. 11.15				
	767.15			21.76

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction G)

1. Source of income	2. Nature of income	3. Amount
		\$

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23)

(1) Personal Exemption			(2) Credit for Dependents		
Status	Number of months during the year in each status	Credit claimed	Name of dependent and relationship	Number of months during the year	Credit claimed
				Under 18 years old	Over 18 years old
Married and not living with husband or wife			Wife	12	
Living with husband or wife	12	\$ 250.00	1 child		\$ 400.00
Family (explain below)			2 children		400.00
			3 children		400.00
			Reason for support if over 18 years old		1600.00

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 26)

(1) If your net income is \$3,000 or less, use only this part of schedule		(2) If your net income is more than \$3,000, use only this part of schedule	
Item 20, page 1	\$	Earned net income (not more than \$14,000)	\$
Net income credit (10% of net income)		Net income (item 20, page 1)	
		Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)	

QUESTIONS

1. Principal occupation or profession Auto. Ins.
2. Are you a citizen ☐ or a resident alien ☐.
3. Return for the preceding year, to which Collector's office sent? 1971
4. If income or deductions of both husband and wife in this return? No
5. Name of husband or wife if separate return was made
6. Check whether this return was prepared on the cash ☐ or accrual ☒ basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501? (Answer "yes" or "no") No (If answer is "yes," attach statement required by Instruction J.)



FORM 1040
Treasury Department
Internal Revenue Service

UNITED STATES INDIVIDUAL INCOME AND DEFENSE TAX RETURN

19

(Auditor's Stamp)

Civ. 837
Plaint. Exh
"D-3"
admitted
11-29-48

FOR GROSS INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES,
DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM
OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1940

or fiscal year beginning _____, 1940, and ended _____, 1941

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instruction C)

John Nii
(Name) (Use given names of both husband and wife, if this is a joint return)

P. O. Box 1164

(Street and number, or rural route)

Waukegan

(Post office)

Ill.

(County)

(State)

(Do not use these)

File
Code
Serial
No.

District

(Cashier's Stamp)

Cash—Check—

First Payment

Item and
Instruction No.

INCOME

1. Salaries and other compensation for personal services. (From Schedule A) \$ *264.55*
2. Dividends \$ *51*
3. Interest on bank deposits, notes, mortgages, etc. *Per. Rate 11.70*
4. Interest on corporation bonds \$ *72*
5. Taxable interest on Government obligations, etc. (From Schedule B)
6. Income (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses). (Furnish names and addresses): *Solomon - Waters - Right* \$ *90.00*
7. Income from fiduciaries. (Furnish names and addresses):
8. Rents and royalties. (From Schedule C) \$ *16.51*
9. Income (or loss) from business or profession. (From Schedule D) \$ *69*
10. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule F)
- (b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)
- (c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)
11. Other income (including income from annuities). (State nature)
12. Total income in items 1 to 11. (Enter nontaxable income in Schedule I) \$ *333*

DEDUCTIONS

13. Contributions paid. (Explain in Schedule H) \$ *1.00*
14. Interest. (Explain in Schedule H)
15. Taxes. (Explain in Schedule H) *Per. Rate* \$ *5.00*
16. Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule H)
17. Bad debts. (Explain in Schedule H)
18. Other deductions authorized by law. (Explain in Schedule H)
19. Total deductions in items 13 to 18
20. Net income (item 12 minus item 19) \$ *333*

COMPUTATION OF TAX

21. Net income (item 20 above) \$ *318.84*
22. Less: Personal exemption. (From Schedule J-1) \$ *8.00*
23. Credit for dependents. (From Schedule J-2) \$ *16.00*
24. Balance (surtax net income) \$ *294.84*
25. Less: Interest on Government obligations, etc. (See Instruction 25)
26. Earned income credit. (From Schedule K-1 or K-2)
27. Balance subject to normal tax
28. Normal tax (4% of item 27)
29. Surtax on item 24. (See Instruction 29)
30. Total (item 28 plus item 29)
31. Total income tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F)
32. Less: Income tax paid or source
33. Income tax paid to a foreign country or U. S. possession. (Attach Form 1116)
34. Balance of income tax (item 31 minus items 32 and 33)
35. Defense tax (10% of item 31). (See Instruction 35)
36. Total income and defense taxes due (item 34 plus item 35)

NOTE.—In order that this return may be accepted as meeting the requirements of the Internal Revenue Code, the data called for hereon must be set forth FULLY and CLEARLY.

ORM 1040
 Treasury Department
 Internal Revenue Service

UNITED STATES INDIVIDUAL INCOME TAX RETURN

Page 1
1941

(Auditor's Stamp)

837
 Int. Exp
 D-4
 11/1/41
 89-48

OPTIONAL FORM 1040A MAY BE FILED INSTEAD OF THIS FORM IF GROSS INCOME IS NOT MORE THAN \$3,000 AND CONSISTS WHOLLY OF SALARIES, WAGES, OTHER COMPENSATION FOR PERSONAL SERVICES, DIVIDENDS, INTEREST, RENT, ANNUITIES, OR ROYALTIES.

For Calendar Year 1941

or fiscal year beginning _____, 1941, and ending _____, 1942

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instruction C)

Shoso Nii

(Name) (Use given names of both husband and wife, if this is a joint return)

P. O. Box 1164

(Street and number, or rural route)

Waipahu

Oahu, T. H.

(Post office)

(County)

(State)

(Do not use these spaces)

File

Code

Serial

No.

District

(Cashier's Stamp)

Cash-Check-M. O.

First Payment

INCOME

	Amount	Deductible Expenses (Attach itemized statement)	
Salaries and other compensation for personal services, \$	\$		
Dividends	Home-Auto use		
Interest on (a) bank deposits, notes, etc., \$	Sumitomo Corporation bonds, \$	60.00	✓
Interest on Government obligations, etc.	Home: Light & Water	1.59	✓
(b) From line (b), Schedule A, \$	(b) from line (i), Schedule A, \$	60.00	✓
Rents and royalties. (From Schedule B)			
Annuities	Discount Received	1132.09	✓
		19.86	✓
ITEMS 7, 8, AND 9, BELOW (AND PAGES 3 AND 4) NEED NOT BE CONSIDERED UNLESS YOU HAVE INCOME (OR LOSSES) IN ADDITION TO ITEMS ABOVE.			
(a) Net short-term gain from sale or exchange of capital assets. (From Schedule F)			
(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)			
(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)			
Net profit (or loss) from business or profession. (From Schedule H)		383.24	✓
(State total receipts, from line 1, Schedule H, \$)			
Income (or loss) from partnerships; fiduciary income; and other income. (From Schedule I)			
Total income in items 1 to 9			\$ 1656.78

DEDUCTIONS

Contributions paid. (Explain in Schedule C)			
Interest. (Explain in Schedule C)		40.50	✓
Taxes. (Explain in Schedule C)		12.77	✓
Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule C)			
Indebtedness. (Explain in Schedule C)			
Other deductions authorized by law. (Explain in Schedule C)			
Total deductions in items 11 to 16			53.27
Net income (item 10 minus item 17)			\$ 1603.51

COMPUTATION OF TAX

Net income (item 18 above)	\$ 1603.51	26. Normal tax (4% of item 25)	\$
Less: Personal exemption. (From Schedule D-1)	150	27. Surtax on item 22. (See Instruction Z)	\$
Credit for dependents. (From Schedule D-2)	1600	28. Total (item 26 plus item 27)	\$
Excess (surplus net income)	\$ 12.77	29. Total tax (item 28 or line 16, Schedule F)	\$
Less: Item 4 (a) above.		30. Less: Income tax paid at source	\$
Earned income credit. (From Schedule E-1 or E-2)		31. Income tax paid to a foreign country or U. S. possession. (Attach Form 1116)	\$
Balance subject to normal tax	\$	32. Balance of tax (item 29 minus items 30 and 31)	\$

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, and that the Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to by _____
 I certify this _____ day of _____, 1941

(Signature) (See Instruction E)

(Signature and title of officer administering oath)
 made by an agent must be accompanied by power of attorney. (See Instructions E.)

If this is a joint return (not made by agent), it must be signed by both husband and wife. It must be sworn to before a proper officer by the person preparing the return.

IF THIS RETURN WAS PREPARED FOR YOU BY SOME OTHER PERSON, THE AFFIDAVIT ON PAGE 4 MUST BE EXECUTED

Schedule A.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction G)

1. Obligations or securities	2. Amount owned at end of year including your proportionate share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Amount of principal, interest on which is exempt from taxation	5. Interest on amount in excess of exempt and dividends in respect to surplus
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$	All	XXXXXXXXXX
(b) Obligations issued prior to March 1, 1941, under Federal Farm Loan Act, or under such Act as amended			All	XXXXXXXXXX
(c) Obligations of United States issued on or before September 1, 1917			All	XXXXXXXXXX
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness issued prior to March 1, 1941			All	XXXXXXXXXX
(e) United States Savings Bonds and Treasury Bonds issued prior to March 1, 1941			\$5,000	\$
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above) issued prior to March 1, 1941			None	
(g) Dividends on share accounts in Federal savings and loan associations	XXXXXXXXXXXX	XX XXXXXXXX	XX	XX
(h) Total (enter as item 4 (a), page 1)				\$
(i) Obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof (enter amount of interest as item 4 (b), page 1)			Amount owned at end of year	Interest received or accrued during the year (to be normal tax and)

Schedule B.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 5)

1. Kind of property	2. Amount	3. Depreciation or depletion (attach schedule)	4. Repairs (explain below)	5. Other expenses (itemize below)	6. Net profit (column 2 less sum of columns 3, 4, & 5) (enter as item 5, page 1)
Cottages	\$ 1717.31	\$	\$ 14.83	\$ 570.39	1132.29

Explanation of deductions claimed in columns 4 and 5: Water 172.01; Gross Income Tax 30.10; Rent 20.00; Real Property Tax 88.16

Schedule C.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 11, 12, 13, 14, 15, AND 16

1. Item No.	2. Explanation	3. Amount	1. Item No. (Continued)	2. Explanation (Continued)	3. Amount (Continued)
11	Hongwangi Mission	\$ 25.30	13	Terr. Inc. Taxes	\$ 7.00
11	Waipahu Map School	10.00	13	Poll Tax	5.00
11	United Welfare Ass.	3.00			
11	T. B. Association	2.00			

Schedule D.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 20 AND 21. (See Instructions 20 and 21)

(I) Personal Exemption			(II) Credit for Dependents		
Status	Number of months during the year in each status	Credit claimed	Name of dependent and relationship	Number of months during the year	Credit claimed
				Under 18 years old	18 years or over
Single, or married and not living with husband or wife, and not head of family		\$	Masashi (son 6)	12	\$ 40.00
Married and living with husband or wife	12	1500.00	Kiyoshi (son 4)	12	40.00
Head of family (explain below)			Father	12	40.00
			Mother	12	40.00
			Reason for support if 18 years or over		

Schedule E.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 24)

(I) If your net income is \$3,000 or less, use only this part of schedule	(II) If your net income is more than \$3,000, use only this part of schedule
Net income (item 18, page 1)	Earned net income (not more than \$14,000)
Earned income credit (10% of net income, above)	Net income (item 18, page 1)
	Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)

QUESTIONS

- State your principal occupation or profession Grocery & Gen. Mch.
- Name and address of employer Honolulu
- Did you file a return for any prior year? yes If so, what was the latest year? 1938 To which Collector's office was it sent?
- If separate return was made for the current year, state:
 - Name of husband or wife
 - Personal exemption, if any, claimed thereon
 - Collector's office to which it was sent
- Check whether this return was prepared on the ☐ cash or ☒ accrual basis.
- If return on cash basis, do you elect, under section 442, to include as income
 - in the redemption price of noninterest-bearing obligations issued after 1917? If so, attach statement listing obligations and computation of the accrued income. Report such income as item 3 or 4, page 1, whichever applicable.
 - Did you receive during the taxable year any nontaxable income or interest reported in Schedule A (see Instruction G)? If so, attach schedule showing source, nature, and amount of such income.
 - Did you at any time during your taxable year own directly or any stock of a foreign corporation or a personal holding company as defined by section 501 of the Internal Revenue Code? If so, attach statement required by Instruction J.

Name Shoso Nii
 Rural Route P. O. Box 1164
 Business Address Waipahu, Oahu, T. H.

Schedule H. -- PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION.

NO. 13

Personal Property Tax	\$ 85.81 ✓
Gross Income Tax	226.78 ✓
Liquor Tax	208.00 ✓
Territorial Unemployment Compensation	13.26 ✓
Social Security Tax	5.78 ✓
Gross Income License	1.00 ✓
Tobacco License	10.00 ✓
Poison	2.00 ✓
Meat & Pork	10.00 ✓
Federal Liquor License	27.50 ✓
Territorial Liquor License	180.00 ✓
Liquor Permit	<u>1.00 ✓</u>
TOTAL	\$ 771.13

NO. 17

Rent	\$ 254.00
Automobile Expense	226.49
Light & Telephone	173.96
Advertisement	9.00 ✓
Water & Ice	13.40
Office Expense	408.18 ✓
Insurance	116.80 ✓
Repairs	54.00 ✓
Selling Expense	<u>66.78</u>
TOTAL	\$ 1322.81

Schedule H.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 8)

(State (1) nature of business; (2) number of places of business; (3) business address and address if different from name and address on page 1

1. Total receipts.....		\$ 13884.2	
COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS	
(To be used where inventories are an income-determining factor)		11. Salaries and wages not included as "Labor" (do not deduct compensation for yourself).....	
2. Inventory at beginning of year.....		\$ 811.0	
3. Merchandise bought for sale.....		12. Interest on business indebtedness.....	
4. Labor.....		13. Taxes on business and business property.....	
5. Material and supplies.....		14. Losses (explain below).....	
6. Other costs (itemize below).....		15. Bad debts arising from sales or services.....	
7. Total of lines 2 to 6.....		16. Depreciation, obsolescence, and depletion (explain in Schedule J).....	
8. Less inventory at end of year.....		17. Rent, repairs, and other expenses (itemize below or on separate sheet).....	
9. Net cost of goods sold (line 7 minus line 8).....		18. Total of lines 11 to 17.....	
10. Gross profit (line 1 minus line 9).....		19. Total of lines 9 and 18.....	
		20. Net profit (or loss) (line 1 minus line 19) (enter as item 8, page 1).....	

If the production, manufacture, purchase, or sale of merchandise is an income-producing factor, inventories are required. Enter "C," or "C or M," on lines 2 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.
Explanation of deductions claimed in lines 6, 14, and 17

Schedule I.—INCOME FROM PARTNERSHIPS, FIDUCIARIES, AND OTHER SOURCES

INCOME (OR LOSS) FROM PARTNERSHIPS, SYNDICATES, ETC. (SEE INSTRUCTION 9 (a)) (FURNISH NAMES AND ADDRESSES)	\$.....		
INCOME FROM FIDUCIARIES (FURNISH NAMES AND ADDRESSES)	\$.....		
INCOME FROM OTHER SOURCES (STATE NATURE)	\$.....		
Total amounts in Schedule I. (Enter as item 9, page 1)	\$.....		

Schedule J.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES F, G, AND H

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
Furn. & Fix.	34.41	\$ 2260.90	\$ None	\$ 1356.61	\$ 904.29	10		\$ 222.10
Mach. & Equip.	1936	116.00	"	46.40	69.60	10		11.60
								234.00

AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including all accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this day of 194.....



(Signature of person preparing the return)

(Signature of person preparing the return)

(Signature and title of officer administering oath)

(Name of firm or employer, if any)

UNITED STATES

Page 1

NONRESIDENT ALIEN INCOME TAX RETURN

1942

Auditor's Stamp)

(BUSINESS WITHIN UNITED STATES)

FOR CALENDAR YEAR 1942

(Do not use these spaces)

lv. 837
aint. Exh
"D-5"
imited
L-29-48or fiscal year beginning January 1, 1942, and ending January 1, 1943

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the sixth month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY

Shoos Hui
(Name)
P. O. Box 1164
(Street and number, or rural route)
Wagon 6 Chun, T. H.
(Post office) (State or Country)

File
CodeSerial
No.

District

(Cashier's Stamp)

Cash—Check—M. O.

First Payment

INCOME

Income derived in full from sources within United States, and expenses, losses, and other deductions properly allocated thereto)

Services and other compensation for personal services. (Attach statement)

Dividends. (Attach statement) Wagon garage, etc.

Interest on bank deposits, notes, etc.

Interest on corporation bonds, etc.

Interest on Government obligations, etc.:

(From line (h), Schedule A

(From line (i), Schedule A

Rents and royalties. (From Schedule B)

Annuities Account Earned

Net gain (or loss) from sale or exchange of capital assets. (From Schedule F)

Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)

Profit (or loss) from business or profession. (From Schedule H) For

State total receipts, from line 1, Schedule H, \$

Net gain (or loss) from partnerships; fiduciary income; and other income. (From Schedule I)

Total income in items 1 to 10

DEDUCTIONS

Contributions paid. (Explain in Schedule C)

Interest. (Explain in Schedule C)

Losses. (Explain in Schedule C)

Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule C)

Debts. (Explain in Schedule C)

Other deductions authorized by law. (Explain in Schedule C)

Excess part of deductions not allocated to any class of gross income. (Explain in Schedule K)

Total of items 12 to 18

Income derived in full from sources within United States (item 11 minus item 19)

Portion of net income from sources partly within and partly without United States attributable to sources within United States. (Attach statement)

Total net income from sources within United States (item 20 plus item 21)

COMPUTATION OF TAX

Income (item 22 above)

Personal exemption \$ 12.00Credit for dependents \$ 7.00

Excess (surtax net income)

Item 5 (a) above

Earned income credit

(From Schedule E-1 or E-2)

Amount subject to normal tax

30. Normal tax (6% of item 29)

31. Surtax on item 26. (See Instruction 31)

32. Total (item 30 plus item 31)

33. Total tax (item 32 or line 16, Schedule F)

34. Less: Income tax paid at source

35. Balance of tax (item 33 minus item 34)

I declare, under the penalties of perjury, that this return (including any accompanying schedules and statements) has been examined by me/us, and the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Prepared by (other than taxpayer or agent) preparing return)

(Date)

(Taxpayer)

(Date)

(Name of firm as employer, if any)

(Agent)

(Date)

A return made by an agent must be accompanied by power of attorney. (See Instruction E)

Schedule A.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction 5)

Page 2

1. Obligations or securities	2. Amount owned at end of year including your proportionate share of each obligation held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Amount of principal interest on which is exempt from taxation	5. Interest on amount in excess of exemption, and dividends subject to surtax only
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions.	\$	\$	All	XXXXXXXXXX
(b) Obligations issued prior to March 1, 1941, under Federal Farm Loan Act, or under such Act as amended.			All	XXXXXXXXXX
(c) Obligations of United States issued on or before September 1, 1917.			All	XXXXXXXXXX
(d) Treasury Notes issued prior to December 1, 1940, Treasury Bills and Treasury Certificates of Indebtedness issued prior to March 1, 1941.			All	XXXXXXXXXX
(e) United States Savings Bonds and Treasury Bonds issued prior to March 1, 1941.			\$5,000	\$
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above) issued prior to March 1, 1941.			None	
(g) Dividends on share accounts in Federal savings and loan associations in case of shares issued prior to March 28, 1942.	XXXXXXXXXXXX	XXXXXXXXXX	XXXX	
(h) Total (enter as item 5 (a), page 1).				\$
(i) Treasury Notes issued on or after December 1, 1940, and obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof (enter amount of interest as item 5 (b), page 1).			Amount owned at end of year	Interest received or accrued during the year (subject to normal tax and surtax)

Schedule B.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 6)

1. Kind of property	2. Amount	3. Depreciation or depletion (explain in Schedule J)	4. Repairs (explain below)	5. Other expenses (itemize below)	6. Net profit (column 2 minus sum of columns 3, 4, and 5) (enter as item 6, page 1)
patents	\$ 2545 08		\$ 138 14	\$ 797 65	\$ 1658 79

Explanation of deductions claimed in columns 4 and 5. 217.37.44 & P.T. 117.63 with 100.40
Rent 2500.00 Insurance 20.10

Schedule C.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 12, 13, 14, 15, 16, AND 17

1. Item No.	2. Explanation	3. Amount	1. Item No. (Continued)	2. Explanation (Continued)	3. Amount (Continued)
1210	Red cross	\$ 20 00	1211	Emergency War Relief	\$ 5 00
	Practical Mission	5 00			
	United Negro College	5 00			
	Tuberculosis Assoc	2 00			47 00

Schedule D.—EXPLANATION OF CREDITS CLAIMED BY RESIDENT OF A CONTIGUOUS COUNTRY IN ITEMS 24 AND 25. (See Instructions 24 and 25)

(1) Personal Exemption			(2) Credit for Dependents		
Status	Number of months during the year in each status	Credit claimed	Name of dependent and relationship	Number of months during the year: Under 18 years old 18 years or over	Credit claimed
Single, or married and not living with husband or wife, and not head of family.			Marshall 75 on	10	\$ 250 00
Married and living with husband or wife.	10	10 00	Raymond 5 "	"	25 00
Head of family (explain below)					7 00
			Reason for support if 18 years or over		

Schedule E.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 28)

(1) If your net income is \$3,000 or less, use only this part of schedule		(2) If your net income is more than \$3,000, use only this part of schedule	
Net income (item 22, page 1).	\$	Earned net income (not more than \$14,000).	\$
Earned income credit (10% of net income, above).		Net income (item 22, page 1).	
		Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300).	

QUESTIONS

- Country of which you are a citizen or subject United States
- State your principal occupation or profession Govt. Agent
- Did you file a return for any prior year? 1941 If so, what was the latest year? 1941 To which Collector's office was it sent? XXXXX
- Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
- Was the rate of your salary or wages increased or decreased after October 3, 1942, and before the end of your taxable year? No (Yes or No)
- Have you excluded from gross income in this return any amount from sources within the United States, other than interest reported in Schedule A? No If so, attach statement setting forth the amount, nature, and source of each such item of income and the reason it has been excluded from gross income.

XXXXX

Schedule H.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 9)

(1) nature of business Garage & Gen. Rep. (2) number of places of business 1 (3) business name and address if different from name and address on page 1 New York, Waipahu, Oahu

Total receipts \$258.77 96

COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS	
Inventory at beginning of year	\$ 16.44 67	11. Salaries and wages not included as "Labor" (do not deduct compensation for yourself)	\$ 307.00
Merchandise bought for sale	2217.58 66	12. Interest on business indebtedness	
Material and supplies		13. Taxes on business and business property	600.80
Other costs (itemize below)		14. Losses (explain below)	
Total of lines 2 to 6	\$ 23819.93	15. Bad debts arising from sales or services	
Inventory at end of year	3378.27	16. Depreciation, obsolescence, and depletion (explain in Schedule J)	227.37
Cost of goods sold (line 7 minus line 8)	\$ 20441.66	17. Rent, repairs, and other expenses (itemize below or on separate sheet)	1700.36
Gross profit (line 1 minus line 9)	\$ 54.56 30	18. Amortization of emergency facilities (attach statement)	
		19. Total of lines 11 to 18	\$ 5632.15
		20. Total of lines 9 and 19	\$ 26353.91
		21. Net profit (or loss) (line 1 minus line 20) (enter as item 9, page 1)	\$ 175.75

the production, manufacture, purchase, or sale of merchandise is an income-producing factor, inventories are required. Enter "C," or "C or M," on line 1 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed in lines 6, 14, and 17

did you at any time after October 3, 1942, and before the end of your taxable year have in your employ more than eight individuals? (Yes or No)

er is "Yes," have you in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate after 3, 1942? If answer to second question is "Yes," attach a statement explaining all such increases or decreases. If any of increases or decreases required the prior approval of the National War Labor Board or the Commissioner of Internal Revenue is stated in Instruction also a copy of the authorization for each of such increases or decreases.

Schedule I.—INCOME FROM PARTNERSHIPS, FIDUCIARIES, AND OTHER SOURCES

13. Personal Exp. 76.97 gross Inc. 364.22 ✓
Signor Tax 8.08 U.C.T. 83.60 Expenses in 1.00
Tobacco Lic 10.00 Vols & Post 10.00 Federal Auto
Tax 5.00 Louis. Security 61.72

17 Rent 420.00 Auto Exp 441.50 Light & Tel 294.37
Adv. & Print 65.00 Ins 5.80 Office Exp 287.44
Insurance 41.00 Repairs 82.60 Street Selling 112.63

Schedule J.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B, F, G, AND H

Kind of property (e.g., state material of which constructed)	Date acquired	Cost or other basis (Do not include land or other nondepreciable property)	Assets fully depreciated in use at end of year	Depreciation allowed (or allowable) in prior years	Remaining cost or other basis to be recovered	Estimated life used in accumulating depreciation	Estimated remaining life from beginning of year	Depreciation allowable this year
Int'l + F&A	1942	\$ 199.41 15	None	\$ 1259.07	\$ 635.18	13		\$ 197.49
Exp + Equip	1936	116.00	"	58.00	58.00	10		116.00
								209.49

Schedule K.—EXPLANATION OF RATABLE PART OF DEDUCTIONS NOT ALLOCATED TO ANY CLASS OF GROSS INCOME. (See Instruction 18)

Gross income from all sources	\$	5. Deductions allocated to income from sources within U. S.	\$
Gross income from sources within U. S.	\$	6. Deductions allocated to income from sources without U. S.	\$
of gross income from sources within U. S. to income from all sources (line 2 divided by 1)	\$	7. Deductions not allocated to any class of income	\$
Deductions	\$	8. Amount of such deductions which may be allocated to income from sources within U. S. (line 7 multiplied by line 3)	\$

FORM 1040
 Treasury Department
 Internal Revenue Service

UNITED STATES
INDIVIDUAL INCOME AND VICTORY TAX RETURN

194

 Civ. 837
 Plaintiff, Exh
 "D-6"
 admitted
 11-29-48

 OPTIONAL FORM 1040A MAY BE FILED INSTEAD OF THIS FORM IF GROSS INCOME IS
 REPORTED ON THE CASH BASIS FOR THE CALENDAR YEAR, IS NOT MORE THAN \$1,000,
 AND CONSISTS WHOLLY OF SALARY, WAGES, OTHER COMPENSATION FOR PERSONAL
 SERVICES, DIVIDENDS, INTEREST OR ANNUITIES

FOR CALENDAR YEAR 1943

or fiscal year beginning _____, 1943, and ending _____, 1944

PRINT NAME AND ADDRESS PLAINLY. (See Instruction C)

Shopo, Wil

(Name) (Use given names of both husband and wife, if this is a joint return)

P. O. Box 1164

Honolulu 7, Hawaii

(City or town)

(State)

Occupation

Social Security number, if any

(Do not use these spaces)

 File
 Code

 Serial
 No.

District

(Cashier's Stamp)

COMPUTATION OF NET INCOME
INCOME

	Employer's Name	City and State	Column 1	Column 2
			Income Tax Net Income	Victory Tax Net Income
1 Salary, Wages, and Compensation for Personal Services (Members of armed forces see Instruction I)			\$	\$
Total			\$	\$
Less: Deductible expenses. (Attach itemized statement).				
Compensation after deductible expenses.			\$	\$
2. Dividends	Waipahu Grange, Ltd.		\$04.78	\$04
3. Interest on corporation bonds, bank deposits, notes, etc.				
4. Interest on Government obligations, etc.: (a) From line A (8), Schedule A (b) From line B (5) and (3), Schedule A				xxxxxxx
5. Annuities				
6. (a) Net gain (or loss) from sale or exchange of capital assets. (From Schedule B) (b) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule B)				xxxxxxx
7. Rents and royalties. (From Schedule C (1))			\$1508.30	\$1508
8. Net profit (or loss) from business or profession. (From Schedule C (2)) (State total receipts, from line 1, Schedule C (2) \$)			\$758.88	\$758
9. Income (or loss) from partnerships; fiduciary income; and other income. (From Schedule C (3)).				
10. Total income in items 1 to 9			\$2571.98	\$2571
DEDUCTIONS				
11. Contributions. (Explain in Schedule D)			\$8.00	xxxxxxx
12. Interest. (Explain in Schedule E) (See Instructions 12 and 16 for Victory Tax deduction)				xxxxxxx
13. Taxes. (Explain in Schedule F) (See Instructions 13 and 16 for Victory Tax deduction)				xxxxxxx
14. Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule G)				xxxxxxx
15. Medical, dental, etc., expenses. (Explain in Schedule H)				xxxxxxx
16. Other deductions authorized by law. (Explain in Schedule G)				
17. Total deductions in items 11 to 16			\$8.00	\$
18. Income Tax net income (item 10, col. 1, less item 17, col. 1)			\$2589.98	xxxxxxx
19. Victory Tax net income (item 10, col. 2, less item 17, col. 2)			xxxxxxx	\$2571

INCOME AND VICTORY TAX

20. Unpaid balance of 1943 Income and Victory Tax (from line 22, page 4)		\$	1261
21. You may postpone, until not later than March 15, 1945, payment of the amount you owe up to one-half of item 19 (c), page 4. Enter the amount postponed. (For persons whose surtax net income for 1942 or 1943 exceeded \$20,000, see Schedule L-2)		\$	
22. Amount paid with this return (item 20 less item 21)		\$	
23. Refund or Credit	If the total of your payments (line 21 (d) on page 4) is larger than your tax (line 20 on page 4), enter the difference. Indicate by a check mark (✓) what you want done with this overpayment: Refund it to me <input type="checkbox"/> ; Apply it on my 1944 estimated tax <input type="checkbox"/> .		

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return)

(Date)

(Signature of taxpayer)

(Date)

(Name of firm or employer, if any)

(If this is a joint return (not made by agent), it must be signed by both husband and wife. A return made by an agent must be accompanied by power of attorney. (See Instructions))

THOSE WHOSE INCOME IS SOLELY FROM SALARIES MAY DISREGARD THIS PAGE Page 2

Schedule A.—INTEREST AND OWNERSHIP OF TAXABLE GOVERNMENT OBLIGATIONS, ETC. (See Instruction 4)

SCHEDULE C(2) - PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION

13. Business License 1.00; Auto Stamp Tax 5.00; Tobacco License 10.00; Pork & Meat License 10.00; Personal Property Tax 102.35; Gross Income Tax 572.88; Unemployment Compensation 90.41; Social Security (1%) 35.42; Tobacco Floor Tax 7.61.
17. Rent 420.00; Auto 291.85; Light & Power 237.96; Telephone 39.60; Advertising & Printing 42.00; Ice .90; Office 108.99; Legal and Accounting Fees 451.00; Insurance 56.97; Repairs 129.09; Supplies 223.24; Miscellaneous 48.85.

Less: Amortizable bond premium. (See Instruction 16).....

Balance of interest. (Enter as item 4 (b), column 1, page 1).....

Schedule B.—Schedule B (Form 1040) is a separate sheet and should be used in reporting gains and losses from sales or exchanges of capital assets and property other than capital assets, and filed with and as a part of this return.

Schedule C(1).—INCOME FROM RENTS AND ROYALTIES. (See Instruction 7)

1. Kind of property	2. Amount	3. Depreciation or depletion (explain below)	4. Repairs (explain below)	5. Other expenses (itemize below)	6. Net profit (column 2 less sum of columns 3, 4, and 5) (enter as item 7, page 1)
Stages	\$ 2504 75		\$ 365 20	\$ 631 25	\$ 1508 30

Schedule C(2).—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 8)

(1) nature of business <u>Grocery & General Merchandise</u>; (2) business name <u>S. Mii Store</u>		<u>Waipahu, Oahu, T.H.</u>		\$ <u>29422 07</u>	
Total receipts.....		<u>Waipahu, Oahu, T.H.</u>		\$ <u>29422 07</u>	
COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS			
be used where inventories are an income-determining factor)		11. Salaries and wages not included as "Labor" (do not deduct compensation for yourself).....		\$ <u>3296 40</u>	
the letters "C," "or" "C or M," on lines 2 and inventories are valued at either cost, or cost or net, whichever is lower)		12. Interest on business indebtedness.....		\$ <u>832 63</u>	
Inventory at beginning of year.....		13. Taxes on business and business property.....		\$ <u>122 90</u>	
Merchandise bought for sale.....		14. Losses (explain below).....		\$ <u>2050 25</u>	
Inventory at end of year.....		15. Bad debts arising from sales or services.....		\$ <u>8502 18</u>	
Material and supplies.....		16. Depreciation, obsolescence, and depletion (explain below).....		\$ <u>38683 19</u>	
Other costs (explain below).....		17. Rent, repairs, and other expenses (explain below).....		\$ <u>758 88</u>	
Total of lines 2 to 6.....		18. Amortization of emergency facilities (attach statement).....			
Inventory at end of year.....		19. Total of lines 11 to 18.....		\$ <u>8502 18</u>	
Cost of goods sold (line 7 less line 8).....		20. Total of lines 9 and 19.....		\$ <u>38683 19</u>	
Net profit (line 1 less line 9).....		21. Net profit (or loss) (line 1 less line 20). (Enter as item 8, page 1).....		\$ <u>758 88</u>	

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN COLUMN 3 AND LINE 16, ABOVE

1. Kind of property (things, state material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
Furniture & Fix.	54-44	1994 36	\$ none	\$ 1858 56	\$ 437 78	10		\$ 111 30
Machinery & Equip.	1936	118 00	\$ none	\$ 62 80	\$ 46 40	10		\$ 11 60
								\$ 122 90

EXPLANATION OF DEDUCTIONS CLAIMED IN COLUMNS 4 AND 5, AND LINES 6, 14, AND 17, ABOVE

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
5. C	Rent	\$ 335 40	Sch. C(1)	Gross Income Tax	\$ 95 08
17	Water	\$ 200 82			\$ 631 25

Schedule C(3).—INCOME FROM PARTNERSHIPS, FIDUCIARIES, AND OTHER SOURCES. (See Instruction 9)

Name and address of partnership, syndicate, etc.....	Amount,	\$.....
Name and address of fiduciary.....	Amount,	\$.....
Other income (state nature).....	Amount,	\$.....
Total (enter as item 9, page 1).....		\$.....

COMPUTATION OF INCOME AND VICTORY TAX. (See Tax Computation Instructions)

Page 4

Net income (item 18, page 1)		\$ 2539.96
Personal exemption. (From Schedule 1-1)		
Credit for dependents. (From Schedule 1-2)	\$ 1300.00	
Surplus net income.	700.00	1900.00
Certain interest on Government obligations (item 4 (a), page 1)		689.96
Earned income credit. (From Schedule J-1 or J-2)	\$ none	
Income subject to normal tax	854.00	354.00
Normal tax (6% of line 7)		21.24
Amount on line 4. (See Surplus Table, page 3 of Instructions)		23.16
Income Tax (line 8 plus line 9). (If Schedule B is used and alternative tax computation made, enter line 16, Schedule B)		23.16
Income Tax paid to a foreign country or U. S. possession. (Attach Form 1116)		106.35
INCOME TAX		none
VICTORY TAX (line 6 of Victory Tax Schedule, below)		108.35
Lines 12 and 13		54.54
Tax paid at source on tax-free covenant bond interest. (See Footnote 1)		160.89
Less line 15		none
Tax for 1942. (See Statement, Form 1125, from Collector) (First, see page 4 of Instructions)		160.89
Line 16 or 17 whichever is LARGER. (Members of the armed forces see page 4 of Instructions)		none
WIDENESS FEATURE (Don't fill in (a), (b), and (c) below, if either line 16 or 17 is \$50 or less):		160.89
Line 16 or 17, whichever is SMALLER		
Line 50 or three-fourths of (a), immediately above, whichever is LARGER. This is	\$ none	
THE FORGIVEN part of the tax		none
Enter the UNFORGIVEN part of the tax which is the BALANCE (subtract (b) from (a)). (See Footnote 2)		none
INCOME AND VICTORY TAX. (Total of lines 18 and 19 (c))		none
Income and Victory Tax withheld by employer		160.89
Income Tax paid on 1942 income	\$ none	
Tax paid on 1943 income on account of Declaration of Estimated Tax	none	
(d) Total payments	41.28	
BALANCE OF INCOME AND VICTORY TAX. (If line 20 is larger than line 21 (d), enter the difference here and also as item 20, page 1; if not, see item 23, page 1)		41.28
If you claim a credit in line 18, disregard lines 19 (a) and (b), complete Schedule L-1 on page 4 of Instructions, and enter result in line 19 (c). Attach completed schedule.		
If your surplus net income for 1942 or 1943 exceeded \$20,000, requiring you to complete Schedule L-2, enter here the amount shown on line 18 or 27 of such schedule, \$		119.61

Schedule K.—VICTORY TAX. (See Tax Computation Instructions)

Net income (item 19, page 1)		\$ 2871.96
Specific exemption (\$624 if return reports income of only one person; otherwise, see Instructions, page 3)		624.00
Subject to Victory Tax (line 1 less line 2)		1947.96
Tax before credit (5% of line 3)		97.40
Tax credit:		
Person, or married person not living with husband or wife: 25% (plus 2% for each dependent)		
Line 4, but not more than \$500 (plus \$100 for each dependent)		
Person living with husband or wife if separate returns are filed: 40% (plus 2% for each dependent)		
Line 4, but not more than \$500 (plus \$100 for each dependent)		
Person living with husband or wife if only one return or a joint return is filed, or head of a family:		
(plus 2% for each dependent) of line 4, but not more than \$1,000 (plus \$100 for each dependent).		
Schedule 1-2, for exclusion of one dependent by head of a family)	44%	
Victory Tax (line 4 less line 5). (Enter in line 13, above)		49.88
Victory Tax		54.54

Schedule L.—To be used only by individuals whose surplus net income for 1942 or 1943 exceeded \$20,000. Schedule to determine whether Section 6 (c) of the Current Tax Payment Act of 1943 is applicable

Income for 1942 (item 23, Form 1040 (1942))	\$
Income for 1943 (line 4, above)	\$
Income for base year, \$	plus \$20,000: \$
1940	
Line 1 or 2 is greater than line 3, separate Schedule L-2 should be secured from the collector and filed with and as a part of return.	(Check year used: 1937 1938)

Return is filed for either 1942 or 1943 and separate returns for the other of such years, enter the aggregate of the separate surtax not the separate return year. The surtax net income to be entered in line 3 shall be determined in the same manner as the surtax not entered in line 1 or 2, whichever is the lesser.

File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (Item 8, below) must be paid in full with return. See separate instructions for filling out return.

Page

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN

FOR CALENDAR YEAR 1944

194

Civ. 837
Plaint. Exh.
"D-7"
admitted
11-29-48

or fiscal year beginning _____, 1944, and ending _____, 1945

Do not write in these spaces

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2 (Rev.), as your return, if your total income was less than \$5,000, consisting wholly or largely shown on Withholding Receipts or of such wages and not more than \$100 of other wages, dividends, and interest.

NAME Shores Hui
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS P. O. Box 1164
(PLEASE PRINT. Street and number or rural route)

Washington 7 Hawaii
(City or town, postal zone number) (State)

Social Security
No. (if any)

File

Code

Serial

No.

District

(Cashier's Stamp)

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of wife (or husband). List names of other close relatives with 1944 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Your
Exemptions

NAME (Please print)	Relationship	NAME (Please print)	Relationship
Your name <u>Shores Hui</u>	XXXXXXX		
<u>Wife</u>			
<u>Daughter</u>			
<u>Brother</u>			

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, BEFORE PAY-ROLL DEDUCTIONS for taxes, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see instruction 2.

Your
Income

PRINT EMPLOYER'S NAME	WHERE EMPLOYED (CITY AND STATE)	AMOUNT
		\$

3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation) 204

4. If you received any other income, give details on page 3 and enter the total here 4790

5. Add amounts in items 2, 3, and 4, and enter the total here 5101

If item 5 includes income of both husband and wife, show husband's income here, \$ _____; wife's income here, \$ _____

How to
Figure
Your Tax

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 2. This table, which is provided by law, is based on the same tax rates as are used in the Tax Computation on page 4. The table automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 4.

IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 4. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

6. Enter your tax from table on page 2, or from line 15, page 4. 655

7. How much have you paid on your 1944 income tax?

(A) By withholding from your wages (Attach Withholding Receipts, Form W-2). 391.28

(B) By payments on 1944 Declaration of Estimated Tax 391

Enter total here → 265

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here 265

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here 265

Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1945 estimated tax ☐

If you filed a return for a prior year, what was the latest year? 1943

To which Collector's office was it sent? San Francisco

To which Collector's office did you pay amount claimed in item 7 (B), above? San Francisco

Is your wife (or husband) making a separate return for 1944? No

If "Yes," write below:

Name of wife (or husband) _____

Collector's office to which sent _____

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return)

(Date)

(Signature of taxpayer)

(Date)

(Name of firm or employer, if any)

(SEE TAX TABLE BELOW)

(If this is a joint return of husband and wife, it must be signed by both)

10-4100

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Page 3

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Annuity (total amount you paid in) \$	4. Total amount received this year \$
2. Amount received tax-free in prior years	5. Excess, if any, of line 4 over line 3
3. Amount of your cost (line 1 less line 2) \$	6. Enter line 5, or 3 percent of line 1, whichever is greater \$

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (itemize in Schedule G)
Rentals	\$ 4505.00		\$ 145.80	\$ 498.29
Profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	\$ 4505.00		\$ 145.80	\$ 498.29

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

1. Nature of business <i>General & Retail</i>		2. Business name <i>S. L. H. H. H.</i>	
3. Receipts <i>General & Retail 771</i>		\$ 5088.53	
OF GOODS SOLD			
4. Cost of goods sold (explain in Schedule G)			
5. Inventory at beginning of year	\$ 4546.34		
6. Merchandise bought for sale	\$ 4516.86		
7. Freight and supplies			
8. Total of lines 5 to 8	\$ 4772.22		
9. Inventory at end of year	\$ 4762.42		
10. Cost of goods sold (line 7 less line 9)	\$ 4109.80		
11. Profit (line 1 less line 10)	\$ 578.73		
OTHER BUSINESS DEDUCTIONS			
12. Salaries and wages not included as "Labor"		\$ 3036.52	
13. Interest on business indebtedness			
14. Taxes on business and business property		\$ 777.10	
15. Losses (explain in Schedule G)			
16. Bad debts arising from sales or services			
17. Depreciation, obsolescence and depletion (explain in Schedule F)		\$ 147.75	
18. Rent, repairs, and other expenses (explain in Schedule G)		\$ 1707.85	
19. Amortization of emergency facilities (attach statement)			
20. Net operating loss deduction (attach statement)			
21. Total of lines 11 to 20		\$ 5756.67	
22. Net profit (or loss) (line 1 less line 21)		\$ 4732.06	

Business Lic 100 Auto Lic 36.70 Telephone Lic 10.00 Rent & Heat Lic 10.00
 Prop. Property 118.24 General Lic 184.30 Ten Yearly Prop 85.16 License & Heat 170.31
 Rent 880.00 Auto Exp 477.83 Light & Power 98.83 Telephone 47.20
 Lic. & Print 700 Office Exp 49.75 Suppl & Accounting Fees 480.00 Supplies 170.00
 Bus. Insurance 670.50 Repairs 388.00 Miscellaneous 55.65

Total income from above sources (Enter as item 4, page 1)

\$ 4796.35

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (state material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
Fixtures	14-25	\$ 2013.10		\$ 1667.86	\$ 351.24	10		\$ 22.17
Eng & Eng	1926	11.6		\$ 8.10	\$ 34.90	10		\$ 11.60

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
Rent	\$ 316.00			
in it.	51.76			
General Lic TN	120.52			
Others	10.00			
	498.29			

Do not itemize deductions if—(1) You determine your tax from the tax table on page 2, or
(2) Your total income is \$5,000 or more and you claim the \$500 standard deduction.
If husband and wife living together at end of year file separate returns and one itemizes deductions, the other must file his or her return on Form 1040, and must also itemize deductions.

DEDUCTIONS

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.

		Amount
Contributions		\$
	Allowable Contributions (not in excess of 15 percent of item 5, page 1)	\$
Interest		\$
	Total Interest	
Taxes		\$
	Total Taxes	
Losses from fire, storm, shipwreck, or other casualty, or theft		\$
	Total Allowable Losses (not compensated by insurance or otherwise)	
Medical and dental expenses		\$
	Net Expenses (not compensated by insurance or otherwise)	\$
	Enter 5 percent of item 5, page 1, and subtract from Net Expenses	
	Allowable Medical and Dental Expenses. See Instruction for limitation	
Miscellaneous (including alimony, amortizable bond premium, special deduction for the blind, etc.)		\$
	Total Miscellaneous Deductions	
TOTAL DEDUCTIONS		\$

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 2

1. Enter amount shown in item 5, page 1. This is your Adjusted Gross Income.	\$	5101
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500).	\$	500
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income.	\$	4601
4. Enter your Surtax Exemptions (\$500 for each person listed in item 1, page 1).	\$	200
5. Subtract line 4 from line 3. Enter the difference here. This is your Surtax Net Income.	\$	4401
6. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 5. Enter the amount here.	\$	578
7. Copy the figure you entered on line 3, above. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions).	\$	4601
8. Enter your Normal-Tax Exemption (\$500 if return includes income of only one person; otherwise see Tax Computation Instructions).	\$	500
9. Subtract line 8 from line 7, and enter the difference here.	\$	4101
10. Enter here 3 percent of line 9. This is your Normal Tax.	\$	123
11. Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D).	\$	655
If you used the \$500 standard deduction in line 2, disregard lines 12, 13, & 14, and copy on line 15 the same figure you entered on line 11		
12. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116).	\$	
13. Enter here any income tax paid at source on tax-free covenant bond interest.	\$	
14. Add the figures on lines 12 and 13 and enter the total here.	\$	
15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax.	\$	655

File this return with Collection of Internal Revenue on or before March 15, 1945. Any balance of tax due (item 8, below) must be paid in full with return. See separate instructions for filling out return.

Page 1

RM 1040
Department
Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN

FOR CALENDAR YEAR 1945

1945

or fiscal year beginning _____, 1945, and ending _____, 1945

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than \$100 of other wages, dividends, and interest.

Do not write in these spaces

File

Code

Serial

No.

District

(Cashier's Stamp)

NAME Shores & Kujala Mrs
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS P. O. Box 1164
(PLEASE PRINT. Street and number or rural route)

Honolulu #7, Hawaii, T. 70.
(City or town, postal zone number) (County) (State)

Occupation _____ Social Security No. _____

List your own name.

If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (or defined in instruction 1) with 1945 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

1.	Name (please print)	Relationship	Name (please print)	Relationship
Your name	<u>Shores Mrs</u>			
	<u>Kujala</u>	<u>Wife</u>		
	<u>Marshall</u>	<u>Son</u>		
	<u>Kujala</u>			

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1945, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues,

insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see instruction 2.

2.	Print Employer's Name	Where Employed (City and State)	Amount
			\$

Enter total here →

3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation) _____ \$ 511 00

4. If you received any other income, give details on page 2 and enter the total here _____ \$ 5756 71

5. Add amounts in items 2, 3, and 4, and enter the total here _____ \$ 6067 71

If item 5 includes incomes of both husband and wife, show husband's income here, \$ _____; wife's income here, \$ _____

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

6. Enter your tax from table on page 4, or from line 15, page 3 _____ \$ 876 13

7. How much have you paid on your 1945 income tax?

(A) By withholding from your wages _____ \$

(B) By payments on 1945 Declaration of Estimated Tax _____ \$ 880

Enter total here →

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here _____ \$ 16 73

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here _____ \$

Check (✓) whether you want this overpayment: Refunded to you ☐ or Credited on your 1946 estimated tax ☐

d a return for a prior year, what was the latest year? 1944

Collector's office was it sent? No

Collector's office did you pay claimed in item 7 (B), above?

Is your wife (or husband) making a separate return for 1945? No

If "Yes," write below: ("Yes" or "No")

Name of wife (or husband) _____

Collector's office to which sent _____

are under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

Signature of person (other than taxpayer or agent) preparing return

(Date)

(Signature of taxpayer)

(Date)

(Name of firm or employer, if any)

(If this is a joint return of husband and wife, it must be signed by both)

10-48707-1

#16 Gross Income Tax 25.69 Ten. Working exp. 28.87 Social Security 17.02 22.74
 Business Lic. 1.00 Auto Lic. 40.00 Tithe Lic. 10.00 Park + Heat Lic. 1.00
 Personal Prop. 145.15

#17 Rent 420.00 Auto Expenses 207.46 Light + Power 161.45 Telephone 40.00
 Adv. + Print 10.00 Office Expenses 45.00 Legal + Accounting Fee 420.00
 Insurance 40.27 Depreciation 142.54 Rental Prop. Exp. 640.27 General Exp. 20.33 Supplies

col. 1	(1937)	(reported on schedule 1)	(amount in)	(in schedule 1)
collage	\$ 328.00	79	\$ None	\$ None
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	\$ 338.00	79	\$ None	\$ None

Schedule C—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1560F)

State (1) nature of business Business + general; (2) business name Miss Stone

1. Total receipts

COST OF GOODS SOLD

(To be used where inventories are an income-determining factor)
 (Enter the letters "C," or "C or M" on lines 2 and 8 if inventories are valued at either cost, or cost or market, whichever is lower)

2. Inventory at beginning of year	\$ 5766	42
3. Merchandise bought for sale	\$ 4477	82
4. Labor		
5. Material and supplies		
6. Other costs		
(explain in Schedule G)		
7. Total of lines 2 to 6	\$ 5074	55
8. Less inventory at end of year	\$ 7420	72
9. Net cost of goods sold (line 7 less line 8)	\$ 4334	53
10. Gross profit (line 1 less line 9)	\$ 9282	66

OTHER BUSINESS DEDUCTIONS

11. Salaries and wages not in line 4	\$ 3398	98
12. Interest on business indebtedness		
13. Taxes on business and business property	983	82
14. Losses (explain in Schedule G)		
15. Bad debts arising from sales or services		
16. Depreciation, obsolescence and depletion (explain in Schedule F)	34	75
17. Rent, repairs, and other expenses (explain in Schedule G)	2490	58
18. Amortization of emergency facilities (explain in Schedule G)		
19. Net operating loss deduction (attach statement)		
20. Total of lines 11 to 19	\$ 6907	74
21. Total of lines 9 and 20	\$ 5022	27
22. Net profit (or loss) (line 1 less line 21)		2275

Schedule D—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)
 2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)

Schedule E—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

Name and address of partnership, syndicate, etc.	Amount,	\$
Name and address of estate or trust	Amount,	
Other sources (state nature)	Amount,	
Total		

Total income from above sources (Enter as item 4, page 1)

3 57567

Schedule F—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated to zero at end of year	5. Depreciation allowed (or allowable) (if prior years)	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowed this year
Insurance + Exp.	24-44	2045	65	None	1691	0.1	354	64
Banking + Exp.	1936	116		92	80		21	20
								10
								10
								22
								11
								34

Schedule G—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
		\$			\$

Do not itemize deductions if—(1) you determine your tax from the tax table on page 4, or
 (2) Your total income is \$5,000 or more and you claim the \$500 standard deduction.
 If husband and wife living together at end of year file separate returns and one itemizes deductions, the other must file his or her return on Form 1040, and must also itemize deductions.

DEDUCTIONS

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.	Amount
Contributions	\$
Allowable Contributions (not in excess of 15 percent of item 5, page 1)	\$
Interest	\$
Total Interest	\$
Taxes	\$
Total Taxes	\$
Losses from fire, storm, shipwreck, or other casualty, or theft	\$
Total Allowable Losses (not compensated by insurance or otherwise)	\$
Medical and dental expenses	\$
Net Expenses (not compensated by insurance or otherwise)	\$
Enter 5 percent of item 5, page 1, and subtract from Net Expenses	\$
Allowable Medical and Dental Expenses. See instruction for limitation	\$
Miscellaneous (see instructions)	\$
Total Miscellaneous Deductions	\$
TOTAL DEDUCTIONS	\$

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

Enter amount shown in item 5, page 1. This is your Adjusted Gross Income	\$ 6,267.71	
Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500)	500	
Subtract line 2 from line 1. Enter the difference here. This is your Net Income	\$ 5,767.71	
Enter your Normal-Tax Exemption (\$500 if return includes income of only one person; otherwise see Tax Computation Instructions)	500	
Subtract line 4 from line 3. Enter the difference here. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)	\$ 5,267.71	
Enter here 3 percent of line 5. This is your Normal Tax. (Figure your Surtax below and enter in line 10)	\$ 158.03	
Copy the figure you entered on line 3, above	\$ 5,767.71	
Enter your Surtax Exemptions (\$500 for each person listed in item 1, page 1)	200	
Subtract line 8 from line 7. Enter the difference here. This is your Surtax Net Income	\$ 5,567.71	
Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 9. Enter the amount here	744.90	
Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D)	\$ 896.93	
Use the \$500 standard deduction in line 2, disregard lines 12, 13, and 14, and copy on line 15 the same figure you entered on line 11		
Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116)	\$	
Enter here any income tax paid at source on tax-free covenant bond interest		
Add the figures on lines 12 and 13 and enter the total here		
Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax	\$ 896.93	

File this return with Collector of Internal Revenue on or before March 15, 1947. Any balance of tax due (item 9, below) must be paid in full with return. See separate instructions for filling out return.

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN

FOR CALENDAR YEAR 1946

194

or fiscal year beginning _____, 1946, and ending _____, 1947

Civ. 837
Plaint. Exh
"D-9"
admitted 11-29-48

EMPLOYEES.—Instead of this form, you may use your Withholding Statement, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Statements or of such wages and not more than \$100 of other wages, dividends, and interest.

Name Shore + Syre Inc
(PLEASE PRINT. If this return is for a husband and wife, use both first names)
ADDRESS P. O. Box 1164
(PLEASE PRINT. Street and number or rural route)
71m 7. 74win, T. 74.
(City or town, postal zone number) (County) (State)
Occupation _____ Social Security No. _____

Do not write in these spaces

File Code _____
Serial No. _____
District _____
(Cashier's Stamp)

Your
exemptions

1.	Name (please print)	Relationship	Name (please print)	Relationship
Your name	<u>Shore Inc</u>	<u>xxxxxxx</u>		
	<u>Syre</u>	<u>Wife</u>		
	<u>Shore</u>	<u>son</u>		
	<u>Syre</u>			

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1946, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming tax or reimbursed expenses, see Instruction 2.

Your
Income

2.	Print Employer's Name	Where Employed (City and State)	Amount
			\$
			\$
			\$
			\$

Enter total here → \$ 3110

3. Enter here the total amount of your dividends. 52

4. Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation). 40642

5. If you received any other income, give details on page 2 and enter the total here. 46817

6. Add amounts in items 2, 3, 4, and 5, and enter the total here. 46817

How to
Figure
Your Tax

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, community taxes, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 2.

IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, itemize deductions, the other must also itemize deductions.

Tax Due
or
Refund

7. Enter your tax from table on page 4, or from line 12, page 3. 419

8. How much have you paid on your 1946 income tax?
(A) By withholding from your wages. 720
(B) By payments on 1946 Declaration of Estimated Tax. 720
Enter total here → 720

9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here. 46817

10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here. 46817

Check (✓) whether you want this overpayment: Refunded to you ☐ or Credited on your 1947 estimated tax ☒

If you filed a return for a prior year, what was the latest year? 1945

o which Collector's office was it sent? 71m. T. 74.

o which Collector's office did you pay amount claimed in item 8 (B), above? _____

If your wife (or husband) making a separate return for 1946:
If "Yes," write below:
Name of wife (or husband) Joint Return
Collector's office to which sent _____

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return) (Date) (Signature of taxpayer) (i)

(Name of firm or employer, if any)

(If this is a joint return of husband and wife, it must be signed by both)

@ #13 Gross Income 2,00 Auto Income 35.00
 Tobacco Income 14.00 Profit & Rent Income 10.00 Personal
 Property Tax 176.07 Gross Income TX 857.08 Rev. 4.00
 Compensation, Fr. Social Security (7%) 18.04 Dividend TX 6.00

#17 Rent 770.00 Auto Expenses 545.20 Light & Power 200.81
 Telephone 51.40 Adm & Maint. 14.00 Water 6.60 Office Expense 49.80
 Legal & Accounting Fees 496.00 Insurance 80.27 Repairs 109.00
 Supplies 29.76 Miscellaneous Expense 73.10

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (explain in Schedule G)
Land	\$ 954.20		\$ 784.40	\$ 142.77
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	\$ 954.20		\$ 784.40	\$ 142.77

733 03

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

(1) nature of business Farming & general store (2) business name A. H. H. Store

Total receipts Waipahu, Oahu, T. 76. \$ 57664.44

COST OF GOODS SOLD

be used where inventories are an income-determining factor) of the letters "C" or "M" lines 2 and 8 if inventories are used at either cost, or cost or market, whichever is lower)

Inventory at beginning of year \$ 7440.72

Merchandise bought for sale \$ 50178.22

Inventory at end of year \$ 47479.61

Cost of goods sold (line 7 less line 8) \$ 10184.83

Net profit (line 1 less line 9) \$ 2568.74

OTHER BUSINESS DEDUCTIONS

11. Salaries and wages not in line 4 \$ 3034.10

12. Interest on business indebtedness \$ 1120.71

13. Taxes on business and business property \$ 423.44

14. Losses (explain in Schedule G) \$ 2608.74

15. Bad debts arising from sales or services

16. Depreciation, obsolescence and depletion (explain in Schedule F)

17. Rent, repairs, and other expenses (explain in Schedule G)

18. Amortization of emergency facilities (attach statement)

19. Net operating loss deduction (attach statement)

20. Total of lines 11 to 19 \$ 7616.09

21. Total of lines 9 and 20 \$ 55095.70

22. Net profit (or loss) (line 1 less line 21)

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

Gain (or loss) from sale or exchange of capital assets (from separate Schedule D)

Gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

Name and address of partnership, syndicate, etc. Amount, \$

Name and address of estate or trust Amount, \$

Other sources (state nature) Miscellaneous Income Amount, \$ 962.70

Total \$ 962.70

Total income from above sources (Enter as item 5, page 1) \$ 4264.47

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (make, make and model of vehicle, structure)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated to zero at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
1. + 2. + 3. + 4. + 5. + 6. + 7. + 8. + 9. + 10. + 11. + 12. + 13. + 14. + 15. + 16. + 17. + 18. + 19. + 20. + 21. + 22. + 23. + 24. + 25. + 26. + 27. + 28. + 29. + 30. + 31. + 32. + 33. + 34. + 35. + 36. + 37. + 38. + 39. + 40. + 41. + 42. + 43. + 44. + 45. + 46. + 47. + 48. + 49. + 50. + 51. + 52. + 53. + 54. + 55. + 56. + 57. + 58. + 59. + 60. + 61. + 62. + 63. + 64. + 65. + 66. + 67. + 68. + 69. + 70. + 71. + 72. + 73. + 74. + 75. + 76. + 77. + 78. + 79. + 80. + 81. + 82. + 83. + 84. + 85. + 86. + 87. + 88. + 89. + 90. + 91. + 92. + 93. + 94. + 95. + 96. + 97. + 98. + 99. + 100.								

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Explanation	2. Amount	3. Explanation	4. Amount
1. + 2. + 3. + 4. + 5. + 6. + 7. + 8. + 9. + 10. + 11. + 12. + 13. + 14. + 15. + 16. + 17. + 18. + 19. + 20. + 21. + 22. + 23. + 24. + 25. + 26. + 27. + 28. + 29. + 30. + 31. + 32. + 33. + 34. + 35. + 36. + 37. + 38. + 39. + 40. + 41. + 42. + 43. + 44. + 45. + 46. + 47. + 48. + 49. + 50. + 51. + 52. + 53. + 54. + 55. + 56. + 57. + 58. + 59. + 60. + 61. + 62. + 63. + 64. + 65. + 66. + 67. + 68. + 69. + 70. + 71. + 72. + 73. + 74. + 75. + 76. + 77. + 78. + 79. + 80. + 81. + 82. + 83. + 84. + 85. + 86. + 87. + 88. + 89. + 90. + 91. + 92. + 93. + 94. + 95. + 96. + 97. + 98. + 99. + 100.			

File this return with
due (item 9, below)

Collector of Internal Revenue on or before March 1948. Any balance of tax
must be paid in full with return. See separate instructions for filling out return.

1948. Any balance of tax
actions for filling out return.

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1947

Copy

19

Civ. 837
Plaint. Exh
p-105
admitted
11-29-48

or fiscal year beginning 1947, and ending 1948

EMPLOYEES.—Instead of this form, you may use your Withholding Statement, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Statements or of such wages and not more than \$100 of other wages, dividends, and interest.

Name Shores + Kijoe Niri
(PLEASE PRINT. If this return is for a husband and wife, use both first names)
ADDRESS P. 6. B4-1164
(PLEASE PRINT. Street and number or rural route)
Honolulu 7 Hawaii, T. H.
(City or town, postal zone number) (County) (State)
Occupation _____ Social Security No. _____

Do not write in these
File
Code
Serial
No.
District
(Cashier's Stamp)

Copy

Plaint. Exh
p-105
admitted
11-29-48

Your Exemptions

1.	Name (shown prior)	Relationship	Name (shown prior)	Relationship
Your name	Shores Niri	XXXXXXXXXX	Kijoe Niri	Wife
	Kijoe Niri	Wife	Shores Niri	Husband
	Kijoe Niri	Wife	Shores Niri	Husband

Your Income

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1947, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming to be or reimbursed expenses, see instruction 2.			
2.	Print Employer's Name	Where Employed (City and State)	Amount
			\$ - - -
			\$ - - -
			\$ - - -
			\$ - - -
Enter total here →			\$ 311.00
3. Enter here the total amount of your dividends.....			
4. Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation).....			
5. If you received any other income, give details on page 2 and enter the total here.....			
6. Add amounts in items 2, 3, 4, and 5, and enter the total here.....			

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.		IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage.	
HUSBAND AND WIFE.—If husband and wife file separate returns, each itemizes deductions, the other must also itemize deductions.			
7. Enter your tax from table on page 4, or from line 12, page 3.....			
8. How much have you paid on your 1947 income tax? (A) By withholding from your wages..... (B) By payments on 1947 Declaration of Estimated Tax.....			
Enter total here → \$ 120.00			
9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here.....			
10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here.....			
Check (x) whether you want this overpayment: Refunded to you <input type="checkbox"/> or Credited on your 1948 estimated tax <input checked="" type="checkbox"/>			

Tax Due or Refund

If you filed a return for a prior year, what was the latest year? 1945
To which Collector's office was it sent? Honolulu, T. H.
To which Collector's office did you pay amount claimed in item 8 (B), above?

Is your wife (or husband) making a separate return for 1947? No
If "Yes," write below:
Name of wife (or husband) Joint Return
Collector's office to which sent

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return) (Date) (Signature of taxpayer) (Date)

(If this is a joint return of husband and wife, it must be signed by both)

10-50000-7

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Page 2

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in) \$	4. Total amount received this year \$
2. Amount received tax-free in prior years	5. Excess, if any, of line 4 over line 3
3. Remainder of your cost (line 1 less line 2) \$	6. Enter line 5, or 3 percent of line 1, whichever is greater \$ (Attach separate schedule for each additional annuity or pension)

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (Items in Schedule G)
intertown	\$ 871.00	\$	\$ 10.00	\$ 110.62
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	\$ 871.00	\$	\$ 10.00	\$ 110.62

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1045F)

1. Total receipts \$ 57496.42	2. Business name J. H. H. H.
3. Total cost of goods sold (line 1 less line 2) \$ 4772.55	4. Business address 1285 77
5. Net profit (or loss) (line 1 less line 3) \$ 1285.77	6. Net profit (or loss) (line 1 less line 3) \$ 1285.77

COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS	
(To be used where inventories are an income-determining factor) (Enter the letters "C" or "M" on lines 2 and 8 if inventories are valued at either cost, or cost or market, whichever is lower)		11. Salaries and wages not in line 4	\$ 4772.55
2. Inventory at beginning of year \$ 10115.10		12. Interest on business indebtedness	
3. Merchandise bought for sale \$ 476.73		13. Taxes on business and business property	1285.77
4. Labor		14. Losses (explain in Schedule G)	
5. Material and supplies		15. Bad debts arising from sales or services	
6. Other costs		16. Depreciation, obsolescence and depletion (explain in Schedule F)	3873
7. Total of lines 2 to 6 \$ 5772.42		17. Rent, repairs, and other expenses (explain in Schedule G)	2377.77
8. Less inventory at end of year \$ 10585.56		18. Amortization of emergency facilities (attach statement)	
9. Net cost of goods sold (line 7 less line 8) \$ 47216.47		19. Net operating loss deduction (attach statement)	
10. Gross profit (line 1 less line 9) \$ 10217.15		20. Total of lines 11 to 19 \$ 8556.00	
		21. Total of lines 9 and 20 \$ 5577.47	
		22. Net profit (or loss) (line 1 less line 21) \$ 1765.12	

1. Total receipts \$ 57496.42	2. Business name J. H. H. H.	3. Total cost of goods sold (line 1 less line 2) \$ 4772.55	4. Business address 1285 77	5. Net profit (or loss) (line 1 less line 3) \$ 1285.77
6. Net profit (or loss) (line 1 less line 3) \$ 1285.77	7. Net profit (or loss) (line 1 less line 3) \$ 1285.77	8. Net profit (or loss) (line 1 less line 3) \$ 1285.77	9. Net profit (or loss) (line 1 less line 3) \$ 1285.77	10. Net profit (or loss) (line 1 less line 3) \$ 1285.77
11. Salaries and wages not in line 4 \$ 4772.55	12. Interest on business indebtedness	13. Taxes on business and business property 1285.77	14. Losses (explain in Schedule G)	15. Bad debts arising from sales or services
16. Depreciation, obsolescence and depletion (explain in Schedule F) 3873	17. Rent, repairs, and other expenses (explain in Schedule G) 2377.77	18. Amortization of emergency facilities (attach statement)	19. Net operating loss deduction (attach statement)	20. Total of lines 11 to 19 \$ 8556.00
21. Total of lines 9 and 20 \$ 5577.47	22. Net profit (or loss) (line 1 less line 21) \$ 1765.12			

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	4. Column or Line No.	5. Explanation	6. Amount
1.1	Taxes	\$ 4772.55	1.1	Taxes	\$ 4772.55
1.2	Interest	63.12	1.2	Interest	63.12
1.3	Depreciation	110.62	1.3	Depreciation	110.62

PLAINTIFF'S EXHIBIT "E-1"

REGISTRATION CERTIFICATE

This is to certify that in accordance with the Selective Service Proclamation of the President of the United States, Shoso Nii, Waipahu, Honolulu, T. H., has been duly registered this 26th day of October, 1940.

/s/ KATSUMI FUJIWARA,

Registrar for 9th Precinct, 5th, Honolulu, T. H.

Be Alert:

Keep in touch with your Local Board.

Notify Local Board immediately of change of address.

Carry This Card With You At All Times.

/s/ SHOSO NII,

Registrant.

Description of Registrant

Race: Oriental. Height (Approx.): 5 ft., 7 in.
Weight: 170. Eyes: Brown. Hair: Black. Complexion: Light.

Other obvious physical characteristics that will aid in identification: Scar on left thumb nail; vaccination mark on left arm.

PLAINTIFF'S EXHIBIT "E-2"

[Stamp of Local Board]: Local Board No. 9, Waipahu Fire Station, Waipahu, Oahu, T. H.

June 21, 1941

PERMIT OF LOCAL BOARD FOR REGISTRANT TO DEPART FROM THE UNITED STATES

This is to certify that Shoso Nii, Order No. 2634, Serial No. 2198, Class 3, Division A, a registrant of this Local Board has applied for a permit to depart from the United States, and this Local Board, being convinced that said registrant is not likely to be called for military service during the proposed absence and that the granting of such permit will not result in the evasion of or interference with the execution of the Selective Service Law, hereby authorizes the said registrant to depart from the United States and to remain absent therefrom for 5 Months—Leaving June 26, 1941—Nitta Maru.

In his application the registrant gave this information:

1. Countries to be visited: Japan.
2. Individuals or organizations represented: Self. Mailing address: P.O. Box 416, Waipahu, Oahu.
3. Nature of business: Received urgent telegram from family stating father is very ill. Returning to close up father's affairs.

Description of registrant:

Race: Oriental. Height (Approx.): 5 ft., 7 in.

Plaintiff's Exhibit "E-2"—(Continued)

Weight (Approx.): 170 lbs. Eyes: Brown. Hair: Black. Complexion: Light.

Other obvious physical characteristics that will aid in identification: Scar on left thumb nail. Vaccination mark on left arm.

Date of birth: January 3, 1914.

/s/ E. M. HANSEN,
Member of Local Board.

* * * *

Citizen.

PLAINTIFF'S EXHIBIT "P"

Know All Men By These Presents: That I, Kane-ichi Nii, of Waipahu, City and County of Honolulu, Territory of Hawaii, being of sound and disposing mind and meory and not acting under duress, menace, fraud, or under influence of any person, but being mindful of the uncertainties of human life, do make, ordain, publish and declare this my Last Will And Testament, in the manner following:

First: I hereby revoke, cancel and annul any and all other and former wills, codicils, and testamentary dispositions by me at anytime heretofore made;

Second: I direct the payment of all of my just debts and funeral expenses;

Third: All the rest, residue, and remainder of estate, real, personal and mixed, wheresoever situate, of which I may die, seized or possessed, or which I may be entitled at the time of my decease, I give, devise and bequeath to my beloved son "Shoso Nii", of Waipahu, aforesaid;

To Have And To Hold the same unto the said Shoso Nii for his own use and behoof, absolutely forever.

Fourth: I nominate, constitute and appoint my said son "Shoso Nii", the executor of this my Last Will and Testament, without bond.

In Witness Whereof, I have hereunto subscribed my name in said Waipahu, district of Ewa, Island of Oahu, T. H., this 17th day of December, A.D. 1932,

Plaintiff's Exhibit "P"—(Continued)
in the presence of Tomejiro Tsumoto and E. Ikinaga
whom I have requested to become attesting witness
hereto.

/s/ KANEICHI NII,
Testator.

The foregoing instrument, all written on two pages
only, was subscribed, published and declared by
Kaneichi Nii as and for his Last Will and Testament,
in our presence and in the presence of each of us,
and we, at the time, at his request, in his presence and
in the presence of each other, hereunto subscribe our
names and residences as attesting witness this 17th
day of December, A.D. 1932.

/s/ TOMEJIRO TSUMOTO,
Address: Waipahu, Oahu, T. H.

/s/ E. IKINAGA,
Address: Waipahu, Oahu, T. H.

UNITED STATES EXHIBIT No. 1

CERTIFICATE OF TITLE

Honolulu, Oahu—ss.

We hereby certify that we have carefully examined
the Indexes in the offices of the Clerks of the Supreme
Court, Circuit Court of the First Judicial Circuit,
Tax Assessor and Registrar of Conveyances, as to
the title of Kaneichi Nii in and to:

First: All of that certain parcel of land (portion
of the land described in Royal Patent Number 5694,
Land Commission Award Number 6545, Apana 1 to

United States Exhibit No. 1—(Continued)

H. Haalilio and a portion of Boundary Certificate No. 20 to John Hamauku) situate, lying and being at Ohua, Waikele, in the District of Ewa, City and County of Honolulu, Territory of Hawaii, being Lot "A", and thus bounded and described:

Beginning at the Southeast corner of this piece of land on the west bank of the Kapakahi Stream, being also the Northwest end of present wooden bridge, the true azimuth and distance of the said point to a pipe driven at the Northwest corner of Lot 10, Land Court Application 779 being $339^{\circ} 06' 28.75$ feet, and running by azimuths measured clockwise from true South:

1. $105^{\circ} 50'$ 170.00 feet along the North side of right of way;
2. $15^{\circ} 50'$ 14.80 feet along the West end of right of way;
3. $105^{\circ} 50'$ 105.80 feet along the remaining portion of R.P. 5694 L.C.Aw. 6545 Apana 1 to H. Haalilio, to a pipe;
4. $199^{\circ} 50'$ 140.10 feet along the same, to a pipe;
5. $294^{\circ} 16'$ 218.60 feet along the South bank of the Kapakahi Stream;
6. $311^{\circ} 48'$ 25.54 feet long the West bank of the Kapakahi Stream;
7. $348^{\circ} 10'$ 61.30 feet along the West bank of the Kapakahi Stream;
8. $19^{\circ} 14'$ 27.50 feet along the West bank of the Kapakahi Stream, to the point of beginning.

Containing an Area of 29,200 Square Feet, or 0.670 Acre, or thereabouts.

Together with the additional right to use the right

United States Exhibit No. 1.—(Continued)
of way in common with the owners and occupants of this lot and the remaining portion of R.P. 5694 L.C.Aw. 6545 Apana 1 to H. Haalilio for a road purpose which right of way is described as follows:

Beginning at the Northeast corner of this piece of land on the West bank of Kapakahi Stream, the true azimuth and distance to a pipe driven at the Northwest corner of Lot 10 of Land Court Application 779 being $339^{\circ} 06' 28.75$ feet, and running by azimuths measured clockwise from true South:

1. $339^{\circ} 06' 17.46$ feet along the West bank of the Kapakahi Stream;
2. $105^{\circ} 50' 181.04$ feet along the remaining portion of R.P. 5694 L.C.Aw. 6545 Apana 1 to H. Haalilio;
3. $195^{\circ} 50' 14.80$ feet along Lot "A";
4. $285^{\circ} 50' 170.00$ feet, to the point of beginning and containing an area of 2,598 square feet.

Said above described premises having been conveyed to the said Kaneichi Nii by T. Ota (k), by Deed dated December 27th, A.D. 1932 and recorded in the Office of the Registrar of Conveyances at Honolulu in Liber 1189 on Pages 91-93 on December 27th, A.D. 1932 at 2:22 o'clock p.m.

Second: All of that certain parcel of land (portion of the land described in Royal Patent Number 5694, Land Commission Award Number 6545, Apana 1 to H. Haalilio and a portion of Boundary Certificate No. 20 to John Hamauku) situate, lying and being at Ohua, Waikele, in the District of Ewa, City and County of Honolulu, Territory of Hawaii, and thus bounded and described:

Beginning at the Northeast corner of this piece of land the true azimuth and distance of the said

United States Exhibit No. 1—(Continued)

point of beginning from a pipe driven at the Northwest corner of Lot 10, Land Court Appl. 779, by traverses, being: (a) $159^{\circ} 06'$ 28.75 feet and (b) $105^{\circ} 50'$ 30.0 feet, and running by azimuths measured clockwise from true South:

1. $15^{\circ} 50'$ 14.8 feet;
2. $105^{\circ} 50'$ 140.0 feet;
3. $195^{\circ} 50'$ 14.8 feet;
4. $285^{\circ} 50'$ 140.00 feet to the point of beginning.

Containing an Area of 2,072 Square Feet, or thereabouts.

Together with fifty per cent (50%) of additional undivided interest of right of way to use in common with the Owners and occupants of the above mentioned lot and the remaining portion of L.C.Aw. 6545 Apana 1 to H. Haalilio for a road purpose only, which Right of Way is described as follows:

Beginning at the Northeast corner of this piece of land on the West bank of the Kapakahi Stream, the true azimuth and distance of the said point of beginning to a pipe driven at the Northwest corner of Lot 10 of Land Court Application 779 being $339^{\circ} 06'$ 28.75 feet and running by azimuths measured clockwise from true South:

1. $339^{\circ} 06'$ 17.46 feet along the West bank of the Kapakahi Stream;
2. $105^{\circ} 50'$ 41.04 feet;
3. $195^{\circ} 50'$ 14.80 feet;
4. $285^{\circ} 50'$ 30.00 feet to the point of beginning and containing an area of 526 square feet.

Said above described premises having been con-

United States Exhibit No. 1—(Continued)
veyed to the said Kaneichi Nii by T. Ota (k), by Deed dated July 23rd, A.D. 1938 and recorded in said Registry Office in Liber 1451, Pages 418-420 on July 23rd, A.D. 1938 at 9:35 o'clock a.m.

(Note: Attention is called to the fact that the parcels of land hereinabove described as "Second" with respective areas of 2072 Square Feet and 526 Square Feet lie wholly within and comprise the entire easement area described in "First" with an Area of 2598 Square Feet.)

And We further certify that there are no liens or encumbrances of whatsoever kind or nature against said title, save and except the following, to-wit:

Taxes

The Abstractors have been informed at the Office of the Tax Assessor that all taxes assessed against the land under search (assessed with other land) have been fully paid, save and except the second installment for the year 1944 amounting to the sum of \$26.54, which is now due and payable and unless sooner paid will be delinquent after November 20th, A.D. 1944.

Key: Zone, 9; Section, 4; Plat, 14; Parcel, 9.

Assessed Valuations: Area Assessed, 0.718 acre; Real Property, \$432.00; Improvements, \$1,585.00; Total, \$2,017.00.

And We further certify that the legal title to said parcel of land is vested in the said Kaneichi Nii as shown by said Indexes.

United States Exhibit No. 1—(Continued)

Power of Attorney

Kaneichi Nii (k) to Shoso Nii.

Dated February 7th, 1939. Vol. 1503, page 190.

General Powers

(Recorded: February 27th, 1939 at 10:17 a.m.)

Power of Attorney

Saku Nii (w) to Shoso Nii.

Dated February 7th, 1939. Vol. 1503, page 194.

General Powers

(Recorded February 27th, 1939 at 10:18 a.m.)

In Witness Whereof, We have hereunto set our hand this the Second day of August, A.D., Nineteen Hundred and Forty-Four (1944) at 2:00 o'clock p.m.

MAKINNEY & COMPANY,

By /s/ KENNETH MAKINNEY,

Licensed Abstractors.

12212

OAHU

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

MAND IS HEREBY MADE FOR ALL TAXES NOW DUE, PRESENT THIS BILL WITH YOUR PAYMENT.
It becomes your RECEIPT when stamped by the Cash Register
MAKE CHECK PAYABLE TO TAX COLLECTOR

It becomes your RECEIPT when stamped by the Cash Register
MAKE CHECK PAYABLE TO TAX COLLECTOR

MAKE CHECK PAYABLE TO TAX COLLECTOR

P. O. BOX 259, HONOLULU 9

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL

TERRITORY OF HAWAII FIRST DIVISION

Item	1st Installment Delinquent June 20	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE
	31.10	31.09	62.19 ★

AREA & DESCRIPTION		KEY
0.67 AC LT-A WAIKELE		9-4-9-06
Other	KENEICHI NII	
Address	F Y OMUREI P O BOX 1164 HONOLULU, T H	

Form No. B-6-RP Approved by the Governor of Hawaii, September 14, 1938

Read Carefully the Instructions on the Back of this Bill.

FIRST DIVISION

OAHU

1936

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

AND IS HEREBY MADE FOR ALL TAXES NOW DUE. PRESENT THIS BILL WITH YOUR PAYMENT.

It becomes your RECEIPT when stamped by the Cash Register

MADE CHECK PAYABLE TO TAX COLLECTOR

P. O. BOX 259, HONOLULU 9

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL

TERRITORY OF HAWAII FIRST DIVISION

Item	1st Installment Delinquent June 20	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE
	40.74	40.74	81.48

AREA & DESCRIPTION		KEY
0.67 Ac Lot A Waikele		9-4-11-06
Keneichi Nii		
F.Y. Omurei		
P O Box 1164		
Honolulu, T.H.		

Form No. B-6-RP Approved by the Governor of Hawaii, September 1st, 1936

Read Carefully the Instructions on the Back of this Bill.

1ST DIVISION

OAHU

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

AND IS HEREBY MADE FOR ALL TAXES NOW DUE. PRESENT THIS BILL WITH YOUR PAYMENT.

It becomes your RECEIPT when stamped by the Cash Register

MAKE CHECK PAYABLE TO TAX COLLECTOR

P. O. BOX 259, HONOLULU 9

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL

TERRITORY OF HAWAII FIRST DIVISION

Item	1st Installment Delinquent June 29	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE
	38 98	38 98	77 96

GENERAL INVESTIGATIVE DIVISION	
AREA & DESCRIPTION	KEY
U 67 ACR LT A WAIKELE	7-4-11-6
Office KENEICHI NII	
Address F Y OUREI P O BOX 1164 HONOLULU T H	

No. B-6-RP Approved by the Governor of Hawaii, September 1st, 1934

Read Carefully the Instructions on the Back of this Bill.

FIRST DIVISION

OAHU

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

DEMAND IS HEREBY MADE FOR ALL TAXES NOW DUE. PRESENT THIS BILL WITH YOUR PAYMENT.

It becomes your RECEIPT when stamped by the Cash Register
MAKE CHECK PAYABLE TO TAX COLLECTOR

P. O. BOX 259, HONOLULU 9

DUPLICATE

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL

Item	1st Installment Delinquent June 20	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE
	34 43	34 43	68 86*

TERRITORY OF HAWAII FIRST DIVISION

AREA & DESCRIPTION	KEY
0.67 AC LOT A WAIKELE	9-4-11
KENETCHI NII	
F Y OMUREI P O BOX 1164 HONOLULU T H	

T. H. Form No. B-6-RP Approved by the Governor of Hawaii, September 1st, 1938

Read Carefully the Instructions on the Back of this Bill.

FIRST DIVISION

OAHU

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

DEMAND IS HEREBY MADE FOR ALL TAXES NOW DUE. PRESENT THIS BILL WITH YOUR PAYMENT.

It becomes your RECEIPT when stamped by the Cash Register
MAKE CHECK PAYABLE TO TAX COLLECTOR

P. O. BOX 259, HONOLULU 9

DUPLICATE

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL

Item	1st Installment Delinquent June 20	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE
	36 42	36 42	72 84 *

TERRITORY OF HAWAII FIRST DIVISION

AREA & DESCRIPTION	KEY
0.718 AC LT A WAIKELE	9-4-11
KANEICHI NII	
F Y OMUREI P O BOX 1164 HONOLULU, HAWAII	

T. H. Form No. B-6-RP Approved by the Governor of Hawaii, September 1st, 1938

Read Carefully the Instructions on the Back of this Bill.

FIRST DIVISION

OAHU

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

DEMAND IS HEREBY MADE FOR ALL TAXES NOW DUE. PRESENT THIS BILL WITH YOUR PAYMENT.

It becomes your RECEIPT when stamped by the Cash Register
MAKE CHECK PAYABLE TO TAX COLLECTOR

P. O. BOX 259, HONOLULU 9

DUPLICATE

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL

Item	1st Installment Delinquent June 20	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE
	\$ 32.39	\$ 32.39	\$ 64.78

TERRITORY OF HAWAII FIRST DIVISION

AREA & DESCRIPTION	KEY
0.718 Ac. Lt A Waialeale	9-4-11
Keneichi Nii	
F. Y. Omurei P.O. Box 1164 Honolulu, T. H.	

T. H. Form No. B-6-RP Approved by the Governor of Hawaii, September 1st, 1938

Read Carefully the Instructions on the Back of this Bill.

ST DIVISION

OAHU

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

AND IS HEREBY MADE FOR ALL TAXES NOW DUE. PRESENT THIS BILL WITH YOUR PAYMENT;
 It becomes your RECEIPT when stamped by the Cash Register
 MAKE CHECK PAYABLE TO TAX COLLECTOR

P. O. BOX 259, HONOLULU 9

1948

1941

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL

1st Installment Delinquent June 20	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE
29.32	29.32	58.64

TERRITORY OF HAWAII FIRST DIVISION

AREA & DESCRIPTION	KEY
0.718 AC LT-A WAIKELE	9-4-11-06
Other KANEICHI NII	
Address F. Y. OMUREI P O BOX 1164 HONOLULU, T H	

No. B-6-RP Approved by the Governor of Hawaii, September 1st, 1938

Read Carefully the Instructions on the Back of this Bill.

T DIVISION

OAHU

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

AND IS HEREBY MADE FOR ALL TAXES NOW DUE. PRESENT THIS BILL WITH YOUR PAYMENT;
 It becomes your RECEIPT when stamped by the Cash Register
 MAKE CHECK PAYABLE TO TAX COLLECTOR

P. O. BOX 259, HONOLULU 9

1948

1942

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL

1st Installment Delinquent June 20	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE
28.81	28.82	57.63

TERRITORY OF HAWAII FIRST DIVISION

AREA & DESCRIPTION	KEY
0.718 AC LT A WAIKELE	9-4-14-09
Other KANEICHI NII	
Address F Y OMUREI P O BOX 1164 HONOLULU T H	

No. B-6-RP Approved by the Governor of Hawaii, September 1st, 1938

Read Carefully the Instructions on the Back of this Bill.

DIVISION

OAHU

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

AND IS HEREBY MADE FOR ALL TAXES NOW DUE. PRESENT THIS BILL WITH YOUR PAYMENT;
 It becomes your RECEIPT when stamped by the Cash Register
 MAKE CHECK PAYABLE TO TAX COLLECTOR

P. O. BOX 259, HONOLULU 9

1943

1948

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL

1st Installment Delinquent June 20	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE
29.57	29.57	59.14

TERRITORY OF HAWAII FIRST DIVISION

AREA & DESCRIPTION	KEY
0.718 Ac Lot A Waialeale	9-4-14-09
Other Kaneleichi Mii	
Address F.Y. Omurei P O Box 1164 Honolulu, T.H.	

No. B-6-RP Approved by the Governor of Hawaii, September 1st, 1938

Read Carefully the Instructions on the Back of this Bill.

PAID Collector 1st Division

June 25-28 2006/23 4-1 Current Nov. 8-13 2007/23 4-1 Current

FIRST DIVISION

OAHU

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

DEMAND IS HEREBY MADE FOR ALL TAXES NOW DUE. PRESENT THIS BILL WITH YOUR PAYMENT;

It becomes your RECEIPT when stamped by the Cash Register

MAKE CHECK PAYABLE TO TAX COLLECTOR

P. O. BOX 259, HONOLULU 9

1948
1944

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL			TERRITORY OF HAWAII FIRST DIVISION		
Item	1st Installment Delinquent June 20	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE	AREA & DESCRIPTION	KEY
	26 55	26 54	53 09	0.718 AC LOT A WAIKELE	9-4-14-09
				Owner KANEICHI NII	
				Address F. Y. OMUREI P O BOX 1164 HONOLULU T H	

T. H. Form No. B-6-RP Approved by the Governor of Hawaii, September 1st, 1938

Read Carefully the Instructions on the Back of this Bill.

FIRST DIVISION

OAHU

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

DEMAND IS HEREBY MADE FOR ALL TAXES NOW DUE. PRESENT THIS BILL WITH YOUR PAYMENT;

It becomes your RECEIPT when stamped by the Cash Register

MAKE CHECK PAYABLE TO TAX COLLECTOR

P. O. BOX 259, HONOLULU 9

1948
1945

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL			TERRITORY OF HAWAII FIRST DIVISION		
Item	1st Installment Delinquent June 20	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE	AREA & DESCRIPTION	KEY
	26.32	26.32	52.64	0.718 Ac. Lt. A Waialele	9-4-14-09
				Owner Kaneichi Nii	
				Address F. Y. Omurei P.O. Box 1164 Honolulu, 7 Hawaii	

T. H. Form No. B-6-RP Approved by the Governor of Hawaii, September 1st, 1938

Read Carefully the Instructions on the Back of this Bill.

ST DIVISION

OAHU

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

HEREBY MADE FOR ALL TAXES NOW DUE. PRESENT THIS BILL WITH YOUR PAYMENT;
 It becomes your RECEIPT when stamped by the Cash Register
 MAKE CHECK PAYABLE TO TAX COLLECTOR

1946

P.O. BOX 259. HONOLULU 9

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL

1st Installment Delinquent June 20	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE
25.49	25.50	50.99

TERRITORY OF HAWAII FIRST DIVISION

AREA & DESCRIPTION	KEY
0.718 Ac. Lt. A Waikele	9-4-14-09
Owner Kaneichi Nii	
Address F. Y. Omurei P.O. Box 1164 Honolulu, 7 Hawaii	

Approved by the Governor of Hawaii, September 1st, 1938

Read Carefully the Instructions on the Back of this Bill.

ST DIVISION

OAHU

TERRITORY OF HAWAII REAL PROPERTY TAX BILL

HEREBY MADE FOR ALL TAXES NOW DUE. PRESENT THIS BILL WITH YOUR PAYMENT;
 It becomes your RECEIPT when stamped by the Cash Register
 MAKE CHECK PAYABLE TO TAX COLLECTOR

1947

P.O. BOX 259. HONOLULU 9

THIS BILL IS FOR THE FULL VALUE OF THE PARCEL

1st Installment Delinquent June 20	2nd Installment Delinquent Nov. 20	TOTAL AMOUNT DUE
35.33	35.34	70.67

TERRITORY OF HAWAII FIRST DIVISION

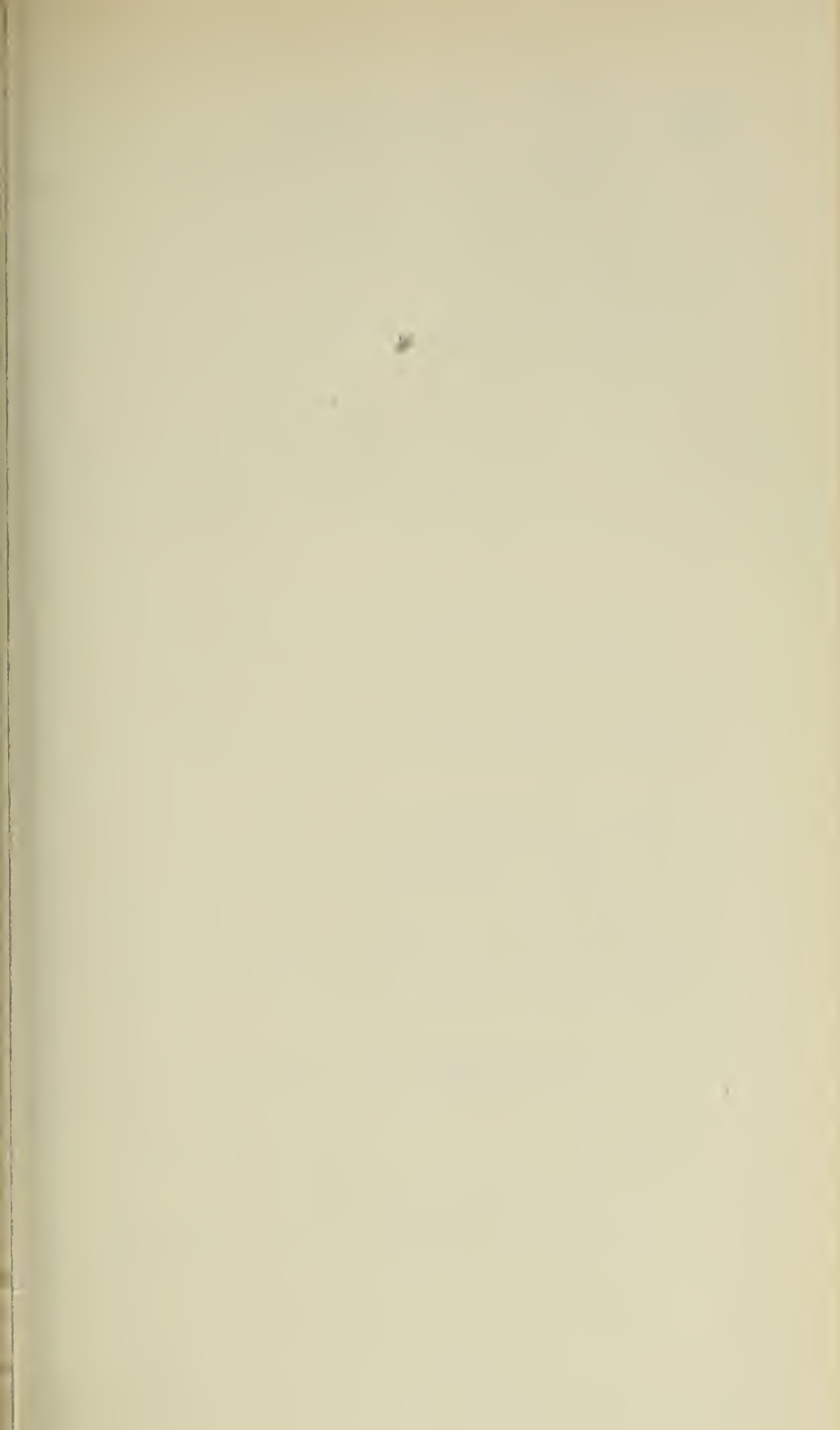
AREA & DESCRIPTION	KEY
0.718 Ac. Lt. A Waikele	9-4-14-09
Owner Kaneichi Nii	
Address F. Y. Omurei P. O. Box 1164 Honolulu, 7 Hawaii	

Approved by the Governor of Hawaii, September 1st, 1938

Read Carefully the Instructions on the Back of this Bill.

Jun-12-1946 466905 1-A-Current 50.99

 35.33
 Jun-24-1947 574284 1-A-Current 35.34
 Nov-18-1947 616013 1-A-Current 35.34



UNITED STATES EXHIBIT 3-A

S. Nii Store, Waipahu, Oahu, T. H.

October 27, 1947

[Stamp]: Alien Property Custodian, Honolulu,
Oct. 30, 1947. Received.

Alien Property Custodian
Yokohama Specie Bank Building
Honolulu, Hawaii

Dear Sir:

This will notify your office that the proceeds of rental income from the property of Kaneichi Nii, covering the period July, 1941, to September, 1947, have been used to purchase merchandise and defray expenses for S. Nii Store.

Two months' extension is requested in order to obtain the necessary funds payable to Alien Property Custodian's Office for the account of Kaneichi Nii. If extension and permission are not granted, I will be forced to hold a special sale to raise the necessary funds.

Your kind attention and consideration will be greatly appreciated.

Yours very truly,

/s/ KATSUTOSHI MIKAMI,

Attorney-in-fact for Shoso Nii dba S. Nii Store.

HM/rs

UNITED STATES EXHIBIT 3-B

[Shiro Kashiwa Letterhead]

December 3, 1947

[Stamp]: Alien Property Custodian, Honolulu,
Dec. 4, 1947. Received.

Mr. James G. Hammond, Acting Manager
Office of Alien Property
Yokohama Specie Bank Building
Honolulu, T. H.

Dear Sir:

I hereby beg to notify you that Mr. Katsutoshi Mikami is no longer the attorney-in-fact of Shoso Nii. Mr. Shoso Nii returned from Japan on November 8, 1947, and he is taking over his own business.

Hereafter will you kindly deal with me as attorney for Shoso Nii in the matter of Vesting Order No. 9777. I shall see you within a few days with relation to the matter of turning over the alleged debt to the Office of the Alien Property.

Yours very sincerely,

/s/ SHIRO KASHIWA.

SK:fo

UNITED STATES EXHIBIT 3-C

[Stamp]: Alien Property Custodian, Honolulu,
Feb. 12, 1948. Received.

P. O. Box 416, Waipahu, Oahu, T. H.
February 11, 1948

Office of Alien Property
Department of Justice
Yokohama Specie Bank Building
Honolulu, T. H.

Re: Real property and a claim owned by Ka-
neichi Nii, a.k.a. Kenichi Nii, V.O. No. 9777

Gentlemen:

Reference is made to your letter to me dated February 6, 1948, requiring a statement showing in detail all rentals collected by or for Shoso Nii, together with expenses of upkeep and taxes, from January 2, 1933.

Shoso Nii returned from Japan on November, 1947, and I have transferred all of his affairs and all of his books and records in connection therewith to him as of January 1, 1948. Consequently, I wish to request that you obtain the mentioned information from Shoso Nii whose address is P. O. Box 416, Waipahu, Oahu, T.H.

Yours very truly,

/s/ KATSUTOSHI MIKAMI.

UNITED STATES EXHIBIT 3-D

Honolulu, Hawaii

March 31, 1948

[Stamp]: Alien Property Custodian, Honolulu,
March 31, 1948. Received.

Office of Alien Property
Yokohama Specie Bank Building
Honolulu, Hawaii

Re: Real Property and claim owned by Kanei-
chi Nii, a.k.a Kenichi Nii V. O. No. 9777

Gentlemen:

In reference to your letter dated March 12, 1948, I wish to state that I cannot supply the necessary information requested by you as I have neither knowledge of all rentals collected nor disbursements made by Kaneichi Nii during the period of January 2, 1933, to June 30, 1941.

I had taken over the interests of Shoso Nii dba S. Nii Store in July, 1941, only after the latter's departure to Japan. The information which you request occurred prior to my managership. However, I believe, Shoso Nii, son of Kaneichi Nii, will be able to furnish you with the necessary information as he was in complete charge of his father's affairs prior to his departure to Japan.

I have, however, furnished your office with all rentals collected and disbursements made during the period July, 1941, to September 30, 1947, during which time I have complete knowledge of same.

United States Exhibit 3-D—(Continued)

Attached you will find the copies of reports which I have made for your office.

Your due consideration to this matter will be greatly appreciated.

Yours very truly,

/s/ KATSUTOSHI MIKAMI.

Enc-2. KM/RS

KANEICHI NII

Waipahu, Oahu, T. H.

Rental Income from July 1, 1941, to September, 1947

Year, 1941

July—I. Konno 32.50; Mrs. Shim 20.00.....	\$ 52.50	
August—I. Konno 32.50; Mrs. Shim 20.00; M. Iizuka 18.00	70.50	
September—I Konno 32.50; Mrs. Shim 20.00.....	52.50	
October—I. Konno 32.50; Mrs. Shim 20.00; M. Iizuka 18.00	70.50	
November—I. Konno 32.50; Mrs. Shim 20.00; M. Iizuka 36.00	88.50	
December—I. Konno 32.50; Mrs. Shim 20.00; M. Iizuka 18.00	70.50	405.00

Year, 1942

January—I. Konno 32.50; M. Iizuka 18.00; Mrs. Shim 20.00	\$ 70.50	
February—I. Konno 32.50; M. Iizuka 18.00; Mrs. Shim 20.00	70.50	
March—I. Konno 32.50; M. Iizuka 18.00; Mrs. Shim 20.00	70.50	
April—I. Konno 32.50; M. Iizuka 18.00; Mrs. Shim 20.00	70.50	
May—I. Konno 32.50; M. Iizuka 18.00; Mrs. Shim 20.00	70.50	
June—I. Konno 32.50; M. Iizuka 18.00; Mrs. Shim 20.00	70.50	

United States Exhibit 3-D—(Continued)
Year, 1942—(Continued)

July—I. Konno 32.50; M. Iizuka 18.00; Mrs. Shim 20.00	70.50	
August—I. Konno 32.50; M. Iizuka 18.00; Mrs. Shim 20.00	70.50	
September—I. Konno 32.50; M. Iizuka 18.00; Mrs. Shim 20.00	70.50	
October—I. Konno 32.50; M. Iizuka 18.00; Mrs. Shim 20.00	70.50	
November—I. Konno 32.50; M. Iizuka 18.00; Mrs. Shim 20.00	70.50	
December—I. Konno 32.50; M. Iizuka 18.00; Mrs. Shim 20.00	70.50	846.00

Year, 1943

January—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	\$ 75.00	
February—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
March—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
April—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
May—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
June—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
July—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
August—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
September—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
October—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
November—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
December—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	900.00

United States Exhibit 3-D—(Continued)

Year, 1944

January—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	\$ 75.00	
February—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
March—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
April—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
May—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
June—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
July—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
August—I. Konno 35.00; M. Iizuka 20.00; Mrs. Shim 20.00	75.00	
September—I. Konno 35.00; M. Iizuka 20.00; B. Enayoda 20.00	75.00	
October—I. Konno 35.00; M. Iizuka 20.00; B. Enayoda 20.00	75.00	
November—I. Konno 35.00; M. Iizuka 20.00; B. Enayoda 20.00	75.00	
December—I. Konno 35.00; M. Iizuka 20.00; B. Enayoda 20.00	75.00	900.00

Year, 1945

January—I. Konno 35.00; M. Iizuka 20.00; B. Enayoda 20.00	\$ 75.00	
February—I. Konno 35.00; M. Iizuka 20.00; B. Enayoda 20.00	75.00	
March—I. Konno 35.00; M. Iizuka 20.00; B. Ena- yoda 20.00	75.00	
April—I. Konno 35.00; M. Iizuka 20.00; B. Ena- yoda 20.00	75.00	
May—I. Konno 35.00; M. Iizuka 20.00; B. Ena- yoda 20.00	75.00	
June—I. Konno 35.00; M. Iizuka 20.00; B. Ena- yoda 20.00	75.00	

United States Exhibit 3-D—(Continued)

Year 1945—(Continued)

July—I. Konno 35.00; M. Iizuka 20.00; B. Enayoda 20.00	75.00	
August—I. Konno 35.00; M. Iizuka 20.00; B. Enayoda 20.00	75.00	
September—I. Konno 35.00; M. Iizuka 20.00; B. Enayoda 20.00	75.00	
October—I. Konno 35.00; M. Iizuka 20.00; B. Enayoda 20.00	75.00	
November—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	
December—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	900.00

Year, 1946

January—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	\$ 75.00	
February—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	
March—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	
April—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	
May—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	
June—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	
July—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	
August—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	
September—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	
October—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	
November—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	
December—I. Konno 35.00; Kaneshiro 20.00; B. Enayoda 20.00	75.00	900.00

United States Exhibit 3-D—(Continued)

Year, 1947

January—G. Kaneshiro 20.00; B. Enayoda 20.00; I. Konno 35.00	\$ 75.00	
February—G. Kaneshiro 20.00; B. Enayoda 20.00; I. Konno 35.00	75.00	
March—G. Kaneshiro 20.00; Pedro Taberas 20.00;	40.00	
April—G. Kaneshiro 20.00; I. Konno 70.00; Pe- dro Taberas 20.00	110.00	
May—G. Kaneshiro 20.00; I. Konno 35.00; Pedro Taberas 20.00	75.00	
June—G. Kaneshiro 20.00; I. Konno 35.00; Pedro Taberas 20.00	75.00	
July—G. Kaneshiro 20.00; I. Konno 35.00; Pedro Taberas 20.00	75.00	
August—G. Kaneshiro 20.00; I. Konno 35.00 Pe- dro Taberas 20.00	75.00	
September—G. Kaneshiro 20.00; I. Konno 35.00; Pedro Taberas 20.00	75.00	675.00

KANEICHI NII

Waipahu, Oahu, T. H.

Rental Expenses from July, 1941, to December, 1946

Year, 1941

July—Water	\$ 5.00	
August—Water	5.00	
September—Water	5.00	
October—Water	5.00	
November—Water	5.00	
December—Water	5.00	30.00

Year, 1942

January—Water Bill — Mrs. Shim	\$ 2.50	
February—Water and Repair pipe	9.30	
March—Water and roofing cement	6.75	
April—Water, elec. wire, repair roof	42.95	
May—Water	2.50	
June—Water	2.50	
July—Water, tax, repair screen	28.50	

United States Exhibit 3-D—(Continued)

Year, 1942—(Continued)

August—Water and repairs	3.95	
September—Water	2.50	
October—Water	2.50	
November—Water	2.50	
December—Water and repairs	38.44	144.89

Year, 1943

January—New water meter and repair water pipe..\$	31.00	
February	None	
March—Pipe work	26.75	
April	None	
May—Roof paper and roof repairs.....	51.30	
June—Repair roof and carpenter labor.....	15.00	
July—Repair kitchen and clean yard.....	28.65	
August—Cesspool work	135.60	
September—Cesspool plumbing work	75.10	
October—Repair toilet	5.00	
November—Washing house; repair water pipe.....	3.00	
December	None	371.40

Year, 1944

January—Bought one flat iron, repair kitchen.....\$	2.95	
February—Repair toilet, pipe and cement work....	34.45	
March—Bought one sickle for yard.....	1.00	
April—Repaired water pipe	3.05	
May—Repaired water pipe	7.00	
June—Repaired screen wire	8.50	
July—Repaired fence	15.00	
August—Cleaned yard, labor	10.00	
September—Repaired toilet, pipe and cement work	42.35	
October	None	
November	None	
December	None	124.30

Year, 1945

January	\$ None	
February	None	
March—Repaired electric wire	30.95	

United States Exhibit 3-D—(Continued)

Year, 1945—(Continued)

April	None	
May	None	
June	None	
July—Repaired toilet	14.98	
August	None	
September	None	
October	None	
November	None	
December	None	45.93

Year, 1946

January	\$ None	
February—Repaired sewer pipe	12.50	
March	None	
April—Cut tree, labor	20.00	
May—Cement work, repaired steps	35.00	
June—Repaired sewer pipe	25.90	
July	None	
August	None	
September	None	
October	None	
November	None	
December	None	93.40

TAXES PAID FOR KANEICHI NII

Year, 1941

Gross Income Tax	\$ 6.08	
Real Property Tax	58.64	64.72

Year, 1942

Gross Income Tax	\$ 12.69	
Real Property Tax	57.63	70.32

Year, 1943

Gross Income Tax	\$ 13.50	
Real Property Tax	59.14	
Federal Income Tax (1/3 of \$41.28)	13.76	86.40

United States Exhibit 3-D—(Continued)

Year, 1944

Gross Income Tax	\$ 13.50	
Real Property Tax	53.09	
Federal Income Tax (1/3 of \$414.32).....	138.11	
Territory Income Tax (1/3 of \$1.97).....	.66	205.36
		<hr/>

Year, 1945

Gross Income Tax	\$ 13.50	
Real Property Tax	52.64	
Federal Income Tax (1/3 of \$1020.58).....	340.19	
Territory Income Tax (1/3 of \$45.14).....	15.05	421.38
		<hr/>

Year, 1946

Gross Income Tax	\$ 13.50	
Real Property Tax	51.25	
Federal Income Tax (1/3 of \$911.93).....	303.98	
Territory Income Tax (1/3 of \$57.34).....	19.11	387.84
		<hr/>

Year, 1947

Gross Income Tax	\$ 12.38	
Real Property Tax	35.33	
Federal Income Tax (1/3 of \$760.50).....	253.50	
Territory Income Tax (1/3 of \$29.52).....	9.84	311.05
		<hr/>

UNITED STATES EXHIBIT 3-E

[Shiro Kashiwa Letterhead]

March 25, 1948

[Stamp]: Alien Property Custodian, Honolulu,
Mar. 26, 1948. Received.

Mr. James G. Hammond, Office of Alien Property,
Bethel & Merchant Streets, Honolulu, T. H.

Re Nii Rental

Dear Sir:

Receipt of your letter dated March 22, 1948, is
hereby acknowledged.

We have statements for rental collected and ex-
penses paid from July, 1941, but since your demand
goes back to 1933 it will take some time before I can
furnish you the information required.

Yours very truly,

/s/ SHIRO KASHIWA.

[Endorsed]: No. 12212. United States Court of
Appeals for the Ninth Circuit. Shoso Nii, Appellant,
vs. Tom C. Clark, Attorney General as Successor to
the Alien Property Custodian, Appellee. Transcript
of Record. Appeal from the United States District
Court for the Territory of Hawaii.

Filed March 28, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12212

SHOSO NII,

Plaintiff-Appellant,

vs.

TOM C. CLARK, Attorney General as Successor to
the Alien Property Custodian,

Defendant-Appellee.

STATEMENT OF POINTS

Comes now Shoso Nii, Plaintiff-Appellant in the above-entitled cause, and states that he intends to rely on the following points in his appeal to this Court:

1. The Court erred in holding that the Plaintiff-Appellant failed to prove his interest in the vested properties by a preponderance of credible evidence in that Plaintiff-Appellant proved his interest in the properties by credible undisputed evidence far in excess of the requirement of preponderance of evidence.

2. The Court erred in holding that even if Plaintiff-Appellant established his claim of equitable title in and to the properties in dispute, the Plaintiff-Appellant would still not be able to recover because the Attorney General as Successor to the Alien Property Custodian was entitled to rely upon the record title in the same manner and to the same extent as a bona fide purchaser would have been in that:

(a) The manner and form by which the said Attorney General as Successor to the Alien Property

Custodian obtained his title to properties did not make him a bona fide purchaser or a person of equivalent status thereto.

(b) That the undisputed evidence showed that actual possession by tenants of Shoso Nii, Plaintiff-Appellant, was notice enough to the Alien Property Custodian to prevent him from having the status of a bona fide purchaser.

3. The Court erred in holding that the Attorney General of the United States as Successor to the Alien Property Custodian was entitled to judgment on the counterclaim and ordering the Plaintiff-Appellant to account under said counterclaim to the said Attorney General all of the net income from the real property vested under Vesting Order No. 9777 for the period May 1, 1935, to and including October 1, 1947, in that by proof far in excess of the requirement of preponderance of credible evidence, Plaintiff-Appellant proved that the real property in question out of which the rentals arose was given to the Plaintiff-Appellant, Shoso Nii, on or about May, 1935, by his father, Kaneichi Nii, and between May 1, 1935, to and including October 1, 1947, the property out of which the rentals were collected was that of Shoso Nii, the Plaintiff-Appellant, solely.

4. The Court erred in entering the order under Section 17 U.S.C.A. Title 50 directing the Plaintiff-Appellant, Shoso Nii, to pay to the Attorney General of the United States as Successor to the Alien Property Custodian the sum of \$3,169.01 pursuant to the Turnover Directive in that at the time said order was issued the Court had no jurisdiction to issue such a summary order, when the Court refused to grant

the motion under Section 17 U.S.C.A. Title 50 and went ahead with the hearing of the case on its merits it lost its jurisdiction to order any payments under the said motion under said Section 17 U.S.C.A. Title 50.

5. The Court erred in entering the order under Section 17 U.S.C.A. Title 50 directing the Plaintiff-Appellant, Shoso Nii, to account for and pay over to the Attorney General the net income from the vested property for the period from May 1, 1935, to and including July 1, 1941, in that the Court at the time said order was issued had no jurisdiction to enter such a summary order the Court having once refused the motion under said Section 17 U.S.C.A. Title 50 and having gone ahead with the hearing on the merits of the case and further under Section 17 U.S.C.A. Title 50 the order, if any, must be for a sum certain and a debt in "prae senti".

6. That the Court erred in deciding the case against the Plaintiff-Appellant and in favor of the defendant in spite of the overwhelming testimony adduced by the Plaintiff-Appellant in his favor by the Court's meticulous and undue emphasis on the evidence by deposition of Kaneichi Nii wherein deponent stated, "I made a power of attorney to Shoso Nii in Kobe about December, 1935, to dispose of my properties in Hawaii" (emphasis ours) when such reference to "my properties" was entirely proper in that as far as the bare legal title was concerned it still was Kaneichi Nii's, the deponent; that the said statement was the only evidence against the entire evidence for the Plaintiff-Appellant in the

entire case and Plaintiff-Appellant clearly proved his case by a preponderance of evidence.

7. That the Court erred in holding upon the evidence adduced that Plaintiff-Appellant did not acquire title to the parcels in dispute by way of adverse possession.

8. That the Court erred in refusing to make the following findings of fact:

(a) That from the time Kaneichi Nii left for Japan in 1935 up to the effective date of the Vesting Order, Shoso Nii collected as his own all rentals from the property in dispute; that Shoso Nii paid to the Territory of Hawaii in Shoso Nii's name gross income taxes on the gross rental derived from the premises; that Shoso Nii paid to the Territory of Hawaii in Shoso Nii's name net income taxes due to the Territory of Hawaii for the rental collected; that Shoso Nii paid to the United States of America through the Bureau of Internal Revenue net income taxes in the name of Shoso Nii on the rentals collected; that Shoso Nii paid for all expenses of upkeep of the property; that between June, 1941, to the date of the Vesting Order above mentioned Shoso Nii acted under and through his attorney-in-fact Katsutoshi Mikami who held a duly executed and recorded power of attorney signed by Shoso Nii which is in evidence in this cause;

(b) That during Shoso Nii's visit to Japan in 1941 he was unable to return to Hawaii because of the intervening war; that he returned to Hawaii on November 8, 1947; that during said period June, 1941,

to November 8, 1947, he was a resident of the Territory of Hawaii; that at the time of filing of this suit Shoso Nii was a resident of the Territory of Hawaii;

(c) That Plaintiff-Appellant, Shoso Nii, on or about 1928 graduated from the eighth grade of Waipahu Elementary School and made application for registration at the Kalakaua Junior High School in Honolulu; that he was accepted for enrollment by the said Kalakaua Junior High School; that he did not continue his studies there but instead helped Kaneichi Nii, his father, at said Kaneichi Nii's store; that said Kaneichi Ni at said time and repeatedly thereafter promised Shoso Nii all of said Kaneichi Nii's property in Hawaii at the time of said Kaneichi Nii's death or if said Kaneichi Nii left for Japan if Shoso Nii left school and helped at the said store; that the fact that there was such an agreement is corroborated by the testimony of Mr. Ikinaga and by the evidence of written entries made in the books of the Waipahu Garage, Ltd., a corporation in which Kaneichi Nii was a record stockholder up to 1939 showing that in spite of the fact that Kaneichi Nii remained the record stockholder, Shoso Nii received dividends in the name of Shoso Nii up to the time of the change of the stock record; that said Shoso Nii relied on said promise and gave up going to school and without any wages put in long hours of work every day including Sundays helping at the Kaneichi Nii's store up to January 2, 1933;

(d) That as of January 2, 1933, Kaneichi Nii, the father, desired to partially and prematurely execute the aforementioned promise and made a gift of the

father's store located at Waipahu to Shoso Nii; that Kaneichi Nii made, executed and delivered a Bill of Sale which was duly recorded, and effectively made a gift of said store to said son; that bank accounts in the name of the father at the Waipahu Branch of the Bank of Hawaii were also transferred to the son when the Bill of Sale was made;

(e) That on the 17th day of December, 1932, said Kaneichi Nii made and signed a document purporting to be a will in accordance with the promise aforementioned in subparagraph (c) bequeathing all of his properties, both real and personal, to the Plaintiff-Appellant;

(f) That Plaintiff-Appellant in reliance on the promise aforementioned in subparagraph (c) built two (2) two-bedroom houses on the premises in dispute and a substantial stonewall to keep the water of the Waipahu River from flooding the premises at the total expense to him of about \$3,000.00;

(g) That in 1938 the Plaintiff-Appellant negotiated for the purchase of the second and smaller parcel of real estate which is part of the property involved in this proceeding and serves as a right of way to the larger parcel in dispute; that the Plaintiff-Appellant was able to direct the form and in whose name this deed was to be executed; that the Plaintiff-Appellant caused title to the second parcel of real estate to be taken in the name of his father, Kaneichi Nii, because the right of way was to be appurtenant to the main parcel; that Plaintiff-Appellant at that time knew that title to the larger parcel

of real estate was in the name of his father, Kaneichi Nii; that the entire consideration for the small parcel was paid by Shoso Nii;

(h) That subsequent to May, 1935, up to the date of the Vesting Order, Plaintiff-Appellant had possession of the premises in dispute; his tenants lived on the premises in dispute;

(i) That for more than ten (10) years continuously and without interruption Plaintiff-Appellant had the open, exclusive, adverse and continuous possession of the premises in dispute;

(j) That in 1935 just before Kaneichi Nii's departure to Japan said Kaneichi Nii orally told Shoso Nii he did give all of his properties to the Plaintiff-Appellant; that said gift was in accordance with the promise aforementioned in subparagraph (c);

(k) That Plaintiff-Appellant's father had to leave for Japan in 1935 sooner than he had expected rather suddenly because of the sudden aggravation of the illness of his daughter who was then ill in Japan; that the fact that she was ill is well established by the testimony of her husband Jinichi Tsumoto;

(l) That because Kaneichi Nii had to depart suddenly for Japan in 1935, no deed of any nature whatsoever was executed by Kaneichi Nii; that there was another parcel of property in Waipahu which remained in the name of Kaneichi Nii close to the property in dispute; that in 1940 Shoso Nii sold this property to Attorney Oliver Kinney and kept for himself the consideration paid by said Attorney Oliver Kinney.

9. That the Court erred in refusing at the end of the case to permit the Plaintiff-Appellant to file his amended complaint to amend his complaint to meet the proof in the case.

Dated at Honolulu, T. H., this 21st day of March, A.D. 1949.

SHOSO NII,
Plaintiff-Appellant,

By /s/ SHIRO KASHIWA,
Attorney for Plaintiff-Appellant.

(Acknowledgment of Service.)

[Endorsed] : Filed Mar. 28, 1949. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

Comes now Shoso Nii, Plaintiff-Appellant in the above-entitled cause, and hereby designates the following parts of the record as necessary in the consideration of the points on which he intends to rely on appeal and requests that the following be printed as provided by the rules:

1. Complaint of Plaintiff-Appellant, Summons, and Officer's Return on Service of Writ.
2. Defendant-Appellee's Answer and Counter Claim.
3. Plaintiff-Appellant's Answer to Counter Claim.
4. Appearance of Counsel, Leon M. Gross.
5. Petition of the Attorney General of the United

States pursuant to Section 17 of the Trading with the Enemy Act as amended.

6. Answer to Petition of Attorney General under Section 17.

7. Oral Decision of the Court on Petition of the Attorney General of the United States for the Entry of an Order under Section 17 of the Trading with the Enemy Act, as amended, Directing Shoso Nii to Turn Over forthwith the Property Vested under Vesting Order No. 9777.

8. Plaintiff-Appellant's Motion for Leave to File Amended Complaint and Amended Complaint.

9. Plaintiff-Appellant's Motion for Findings of Fact.

10. Findings of Fact by the Court after a Trial of the Issues.

11. Conclusions of Law.

12. Opinion.

13. Judgment Order.

14. Order Directing Account and Payment under Section 17, Title 50, U.S.C.A., as amended.

15. The following Exhibits: Plaintiff-Appellant's A-1—Notice of Claim; A-2—Reply Alien Property Custodian; B—Deposition, Kaneichi Nii; C—Power of Attorney—S. Nii to K. Mikami; D-1 to D-10, incl. Income Tax Returns Year 1938 to 1947, inclusive; E-1—Registration Certificate, Selective Service; E-2—Permit to Leave, Selective Service; F—Deed, T. Ota to K. Nii; G—Bill of Sale, K. Nii to Shoso Nii; H—Deed, T. Ota to K. Nii; I—Power of Attorney, K. Nii to Shoso Nii; J—Power of Attorney, Saku Nii to Shoso Nii; K—Vesting Order No. 9777; L—Sketch Location of Property; M—Blue Print Prop-

erty; N—Photostat, Dividend Payment; O—Photostat, Endorsements of Stockbook, Waipahu Garage, Ltd.; P—Will, Kaneichi Nii.

Defendant-Appellee's: No. 1—Certificate of Title; No. 2-A to 2-M, incl., Tax Bills Real Property; No. 3-A—Letter, 10-27-47, K. Mikami to Alien Property Custodian; No. 3-B—Letter, 12-3-47, S. Kashiwa to James Hammond, O.A.P.; No. 3-C—Letter, 2-11-48, K. Mikami to O.A.P.; No. 3-D—Letter, 3-31-48, K. Mikami to O.A.P.; No. 3-E—Letter, 3-26-48, S. Kashiwa to James Hammond, O.A.P.

16. Notice of Appeal.

17. Cost and Supersedeas Bond and Approval of Bond.

18. Order Staying Judgment Order and Staying Order Directing Accounting and Payment under Section 17, Title 50, U.S.C.A., as amended.

19. This Designation of Record.

20. Entire Transcript of Evidence on trial and hearing on merits of cause.

Dated at Honolulu, T. H., this 21st day of March, A.D. 1949.

SHOSO NII,

Plaintiff-Appellant,

By /s/ SHIRO KASHIWA,

Attorney for Plaintiff-Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Mar. 28, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL
BY APPELLEE

The appellee designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action, in addition to the portions of the record, proceedings and evidence heretofore designated by Plaintiff-Appellant in his Designation filed March 28, 1949:

1. Motion for issuance of commission to take deposition, Notice of Motion, Affidavit of Shiro Kashiwa, filed May 11, 1948;

2. Order of Motion for Issuance of Commission to Take Deposition, filed May 13, 1948;

3. Copy of deposition of Kaneichi Nii, etc., filed May 21, 1948;

4. Copy of Commission, filed May 21, 1948;

5. Stipulation and Order for Pre-trial Examination of Shoso Nii and Stipulation for extension of time for filing cross-interrogatories on behalf of Defendant Tom C. Clark, etc., filed July 21, 1948;

6. Notice of motion for Summary Judgment, filed August 18, 1948;

7. Motion to Strike Affidavit of Leon R. Gross and Notice, etc., filed August 23, 1948;

8. Motion for Summary Judgment and Affidavit of Leon R. Gross in support of Motion for Summary Judgment, filed August 24, 1948;

9. Affidavits of Albert K. Makinney and Mark N. Huckestein, filed August 30, 1948;

10. Motion to Strike Affidavits, filed September 3, 1948;

11. Request for Admission of Genuineness of Documents and Request for Admission of Facts pursuant to Rule 36 of the C.R.O.P., filed September 9, 1948;

12. Affidavit of T. Ota in support of Motion for Summary Judgment, filed September 10, 1948;

13. Admission of Facts and of Genuineness of Documents, filed September 13, 1948;

14. Counter Affidavit of Shoso Nii in Answer of Affidavit of T. Ota, filed in support of the motion for Summary Judgment, filed September 14, 1948;

15. Amended Order and Rule to Show Cause, filed October 28, 1948;

16. Marshal's returns, filed October 28, 1948;

17. Motion to reopen case to take additional testimony, filed December 9, 1948;

18. Memorandum of Tom C. Clark, filed December 13, 1948;

19. A copy of this Designation of Additional Parts of the Record by Appellee.

Dated at Honolulu, T. H., this 11th day of April, A.D. 1949.

TOM C. CLARK,

Attorney General of the United States, as Successor
to the Alien Property Custodian, Appellee.

By /s/ RAY J. O'BRIEN,

United States Attorney.

/s/ HOWARD K. HODDICK,

Assistant U. S. Attorney.

/s/ LEON R. GROSS,

Attorney.

All by:

/s/ ROBERT B. McMILLAN,
Assistant United States Attorney, Northern District
of California.

[Endorsed] : Filed April 11, 1949. Paul P. O'Brien,
Clerk.

No. 12,212

IN THE

United States Court of Appeals
For the Ninth Circuit

SHOSO NII,

Appellant,

VS.

TOM C. CLARK, Attorney General as
Successor to the Alien Property
Custodian,

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR SHOSO NII, APPELLANT.

SHIRO KASHIWA,
307 Hawaiian Trust Building, Honolulu, T. H.,
Attorney for Shoso Nii, Appellant.

FILED

SEP 16 1949

PAUL P. O'BRIEN,
CLERK



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No. 12,212

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SHOSO NII,

Appellant,

vs.

TOM C. CLARK, Attorney General as
Successor to the Alien Property
Custodian,

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR SHOSO NII, APPELLANT.

JURISDICTIONAL STATEMENT.

This is an action by the appellant against the Attorney General of the United States as successor to the Alien Property Custodian involving the return of certain parcels of real property situated in the Territory of Hawaii brought under the Trading with the Enemy Act, as amended, 50 USCA Sec. 9(a) and also for ancillary equitable relief arising out of the same matter in conjunction therewith. (Tr. pp. 2-19.)

The Attorney General replied and in conjunction therewith filed on May 3, 1948 a counterclaim under

Section 24(1) of the Judicial Code (28 USC Sec. 41(1)) and Section 17 of the Trading with the Enemy Act, as amended (50 USC App. Sec. 17). (Tr. pp. 20-25.)

On May 6, 1948, the appellant filed his answer to the counterclaim. (Tr. p. 26.)

On August 23, 1948, the appellee initiated a motion for summary judgment (Tr. p. 40) which was denied.

On September 9, 1948, the appellee requested certain admissions of facts (Tr. pp. 84-92) and certain facts were admitted by the appellant. (Tr. pp. 93-94.)

On October 26, 1948, the appellee filed a petition to have the appellant turn over summarily to the appellee \$3,169.01 held by the appellant in accordance with the "Turnover Directive" mentioned in said petition. (Tr. pp. 98-105.) Upon a hearing thereon the Court on November 19, 1948, refused the petition for summary order. (Tr. pp. 107-110.)

On November 29, 1948, and thereafter a trial was held on the merits and "Findings of Facts", and "Conclusions of Law" by the Court were filed on January 26, 1949. An "Opinion" was also filed on January 26, 1949. (Tr. pp. 145-157.)

On January 26, 1949, a judgment order against the appellant and for the appellee was entered on the petition of the appellant and on the counterclaim the Court entered an appropriate order in favor of the appellee. (Tr. pp. 158-159.) Also on said January 26, 1949, an "Order Directing Accounting and Payment

under Section 17, Title 50 USCA as Amended" was entered against the appellant. (Tr. pp. 160-161.)

On February 23, 1949, the appellant filed his notice of appeal.

The United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction upon appeal to review the "Judgment Order" and "Order Directing Accounting and Payment under Section 17, Title 50 USCA as amended" by virtue of the provisions of Section 128(a) of the Judicial Code, as amended February 13, 1925, effective May 13, 1925. (43 Stat. L. 936, 28 USCA Sec. 225.)

STATEMENT OF THE CASE.

Shoso Nii, the appellant, was born on January 13, 1914, at Waipahu, Oahu, and is a citizen of the United States (Tr. pp. 242, 292) residing at Waipahu, Oahu, Territory of Hawaii. He took a trip to Japan in the year 1921 and returned to the United States in 1923. (Tr. p. 292.) He was married at the age of 21. (Tr. p. 293.) In June of 1941, he again took a trip to Japan (Tr. p. 293) to visit his father in Japan who was then very ill. (Tr. p. 295.) At the time of leaving in 1941 he had been registered under the United States Selective Service Act (Tr. pp. 294, 443) and received a special permit to leave the United States for a period of five months. (Tr. pp. 295, 444.) He returned from Japan on November 8, 1947. He was not able to return because there was no transportation

(Tr. p. 296) although he made attempts to get transportation back by seeing the American Consul at Kobe, Japan. (Tr. p. 296.)

The appellant's father is Kaneichi Nii and the appellant is the only son. (Tr. p. 298.) The appellant has two sisters, Hatsuko Nii and Florence Nii. (Tr. pp. 212, 298.) Appellant attended the Waipahu Elementary School at Waipahu, Oahu, Territory of Hawaii, and graduated from the said school. The said school consisted of only eight grades. Thereafter he was accepted at the Kalakaua Intermediate School at Honolulu (Tr. p. 298) but did not go to the said school. He instead left school and started working at his father's store at Waipahu. (Tr. p. 298.) The salesman at his father's store was ill and had to leave for Japan so at his father's request the appellant left school. (Tr. p. 299.) Appellant was induced to leave school upon his father's promise "to give me (appellant) everything he (father) owned in the Territory." (Tr. p. 299.) The promise was made often (Tr. p. 299) and it was to take effect "when he (father) died or when he (father) left this country." (Tr. p. 300.) Appellant graduated from Waipahu School in 1928 and on January 2, 1933 he received his father's store from his father by a duly executed bill of sale. (Tr. pp. 300, 308.) At the same time all of appellant's father's bank accounts, checking and savings, were changed to appellant's name. (Tr. p. 309.)

From 1928 when he graduated from the Waipahu School to January 2, 1933, the date of the bill of sale,

appellant "did practically everything that should be done in a store, especially taking orders and deliveries, getting goods from stores in Honolulu, and the major portion of the work of the store was done by me (appellant)." (Tr. p. 309.) Appellant worked seven days a week from 6 A. M. to 11 P. M. each day. (Tr. p. 310.) Appellant's father was not able to drive a car so appellant drove the Ford truck owned by the store. (Tr. p. 310.) His daily routine was to clean up early in the morning, had breakfast; "then went to Honolulu to get merchandise, and I usually came back around, before or right after lunch; then had lunch, then I went out in the camps to take orders and make deliveries that I took the day before. That would take me up to around eight to nine o'clock in the evening. And then I stayed in the store until closing time." (Tr. p. 312.) The store transferred to the appellant in 1933 was not on the properties in dispute but it was and still is on a leased parcel of land not far from the properties in dispute. (Tr. p. 311.) After the store was transferred to the appellant, he supported his father, mother and youngest sister Florence. (Tr. p. 314.) Other rental properties in the back of the store and near the Ball Park were also turned over to the appellant in January, 1933. (Tr. p. 321.)

Appellant was married in 1934 to a girl his father had picked for him from Japan. (Tr. p. 315.) Appellant never saw her till she arrived in Hawaii from Japan and he married her because his father wanted him to settle down because everything was to be given to appellant. (Tr. p. 315.)

The larger parcel in dispute in this case was purchased on December 27, 1932, in the name of Kaneichi Nii. (Tr. pp. 316-317.) At the time of the purchase there was one house on the lot. (Tr. p. 317.) Later two more buildings were put on the same lot. (Tr. p. 317.) The buildings later put on were two-bedroom cottages, that is to say, each house contained two bedrooms, one parlor and a kitchen. (Tr. p. 318.) An outbuilding (bath and toilet) was erected to serve both houses. (Tr. p. 318.) Appellant paid about \$3,000.00 (Tr. p. 321) for the two houses and the outbuilding from the store account. (Tr. p. 318.) A substantial stone wall was built by the appellant around the property to prevent the Waipahu River from overflowing into the property. (Tr. p. 319.)

After the store was turned over to the appellant, appellant collected all rentals from the property in dispute, paid all Territorial taxes on the property or on income derived from the property. (Tr. p. 321.) This continued from January, 1933, to the date of the vesting order, September 12, 1947. (Tr. p. 13.)

In 1921 when appellant visited Japan his father already had in Japan about three acres of land and a home there. (Tr. p. 323.) In 1935, appellant's father's properties in Japan were worth about 100,000 yen of 1935 valuation or about \$30,000.00. (Tr. p. 328.) His holdings in Japan were sufficient to take care of the appellant's father and his wife for the rest of their lives. (Tr. p. 216.)

Appellant's father left for Japan in May, 1935. (Tr. p. 212.) At the dinner table on the last night before

appellant's father left for Japan he gave appellant, orally, all of his properties in Hawaii. (Tr. pp. 364-365.) He was not healthy at the time of his return (Tr. p. 194) and his daughter Hatsuko was ill. (Tr. p. 216.) About three or four days prior to appellant's father's return to Japan in May, 1935, appellant's father stated to witness Eisuke Ikenaga that appellant's father " * * * had definitely decided to return to Japan and that all the properties he (appellant's father) had in Hawaii he (appellant's father) was going to give to Mr. Shoso, his son, and told me that inasmuch as Shoso was a young man for me (Eisuke Ikenaga) to look after them (appellant's family) as though I were in his place." (Tr. p. 246.) Appellant's father also *frequently* told witness Eisuke Ikenaga that with respect to the main parcel in dispute in this case that the property was to be the appellant's. (Tr. p. 247.) On December 17, 1932, appellant's father signed a will purporting to "give, devise and bequeath" to the appellant all of his properties where-soever situated. (Tr. pp. 284, 461.)

The evidence showed that appellant's father owned prior to his departure in May, 1935, 311 shares of the Waipahu Garage Co. Ltd. (Tr. p. 333.) The president of the corporation, witness Eisuke Ikenaga, was told by appellant's father that all of the said shares were transferred to the appellant, so all dividend payments from December, 1936, to December, 1940, totaling \$834.97 were made to the appellant. (Tr. p. 335.) On April 7, 1939, all of the appellant's father's shares were transferred to the appellant. (Tr. p. 333.)

On February 7, 1939, appellant's father and mother, who were then residents of Japan, executed and delivered to the appellant general powers of attorney naming appellant as attorney in fact. They were recorded in the Bureau of Conveyances of the Territory of Hawaii. (Tr. pp. 60-68.)

After appellant's father had permanently returned to Japan, appellant on July 23, 1938, purchased with his own funds a parcel containing 2072 square feet together with a 50% undivided interest in an adjoining lot, area 526 square feet, to be used for right of way purposes. (Tr. pp. 71, 323-324.) This purchase was made in appellant's father's name because the lot purchased adjoined the main parcel in dispute in this case, which was still then in the name of appellant's father.

When appellant's father returned to Japan in 1935, he owned another lot of about 15,198 square feet near the lot in dispute in this case. In the spring of 1941 a witness Oliver Kinney purchased the lot after negotiating with the appellant. Appellant decided on the price after a counter offer was made and Mr. Kinney paid the price to the appellant. (Tr. pp. 303-304.) The money was put into the appellant's account. (Tr. pp. 320.)

A deposition was taken by the appellant of appellant's father. (Tr. pp. 30-36, 207-221.) Appellant's father answered in response to the questions as follows:

Q. Just prior to your last departure from Hawaii to Japan, did you own any real properties in Hawaii?

A. Yes, land about $\frac{3}{4}$ of an acre.

Q. What did you do with all of your real properties in Hawaii when you last left Hawaii for Japan?

A. After returning to Japan, I made a power of attorney to Shoso Nii at the American Consulate in Kobe about December, 1935, to dispose of my properties in Hawaii.

The foregoing is a brief summary of evidence which was presented to the trial Court. The appellee did not introduce any evidence to dispute any of the evidence above stated.

SPECIFICATION OF ERRORS.

1. The Court erred in holding that the appellant failed to prove his interest in the vested properties by a preponderance of credible evidence in that appellant proved his interest in the properties by credible undisputed evidence far in excess of the requirement of preponderance of evidence.

2. The Court erred in holding that even if appellant established his claim of equitable title in and to the properties in dispute, the appellant would still not be able to recover because the Attorney General as successor to the Alien Property Custodian was entitled to rely upon the record title in the same manner and to the same extent as a bona fide purchaser would have been in that:

(a) The manner and form by which the said Attorney General as successor to the Alien Property Custodian

todian obtained his title to properties did not make him a bona fide purchaser or a person of equivalent status thereto.

(b) That the undisputed evidence showed that actual possession by tenants of Shoso Nii, appellant, was notice enough to the Alien Property Custodian to prevent him from having the status of a bona fide purchaser.

3. The Court erred in holding that the Attorney General of the United States as successor to the Alien Property Custodian was entitled to judgment on the counterclaim and ordering the appellant to account under said counterclaim to the said Attorney General all of the net income from the real property vested under Vesting Order No. 9777 for the period May 1, 1935, to and including October 1, 1947, in that by proof far in excess of the requirement of preponderance of credible evidence, appellant proved that the real property in question out of which the rentals arose was given to the appellant, Shoso Nii, on or about May, 1935, by his father, Kaneichi Nii, and between May 1, 1935, to and including October 1, 1947, the property out of which the rentals were collected was that of Shoso Nii, the appellant, solely.

4. The Court erred in entering the order under Section 17 U.S.C.A. Title 50 directing the appellant, Shoso Nii, to pay to the Attorney General of the United States as successor to the Alien Property Custodian the sum of \$3,169.01 pursuant to the Turnover Directive in that at the time said order was issued the

Court had no jurisdiction to issue such a summary order, when the Court refused to grant the motion under Section 17 U.S.C.A. Title 50 and went ahead with the hearing of the case on its merits it lost its jurisdiction to order any payments under the said motion under said Section 17 U.S.C.A. Title 50.

5. The Court erred in entering the order under Section 17 U.S.C.A. Title 50 directing the appellant, Shoso Nii, to account for and pay over to the Attorney General the net income from the vested property for the period from May 1, 1935, to and including July 1, 1941, in that the Court at the time said order was issued had no jurisdiction to enter such a summary order the Court having once refused the motion under said Section 17 U.S.C.A. Title 50 and having gone ahead with the hearing on the merits of the case and further under Section 17 U.S.C.A. Title 50 the order, if any, must be for a sum certain and a debt in "prae-senti".

6. That the Court erred in deciding the case against the appellant and in favor of the defendant in spite of the overwhelming testimony adduced by the appellant in his favor by the Court's meticulous and undue emphasis on the evidence by deposition of Kaneichi Nii wherein deponent stated, "I made a power of attorney to Shoso Nii in Kobe about December, 1935, to dispose of *my properties* in Hawaii" (emphasis ours) when such reference to "*my properties*" was entirely proper in that as far as the bare legal title was concerned it still was Kaneichi

Nii's, the deponent; that the said statement was the only evidence against the entire evidence for the appellant in the entire case and appellant clearly proved his case by a preponderance of evidence.

7. That the Court erred in holding upon the evidence adduced that appellant did not acquire title to the parcels in dispute by way of adverse possession.

8. That the Court erred in refusing to make the following findings of fact:

(a) That from the time Kaneichi Nii left for Japan in 1935 up to the effective date of the vesting order, Shoso Nii collected as his own all rentals from the property in dispute; that Shoso Nii paid to the Territory of Hawaii in Shoso Nii's name gross income taxes on the gross rental derived from the premises; that Shoso Nii paid to the Territory of Hawaii in Shoso Nii's name net income taxes due to the Territory of Hawaii for the rental collected; that Shoso Nii paid to the United States of America through the Bureau of Internal Revenue net income taxes in the name of Shoso Nii on the rentals collected; that Shoso Nii paid for all expenses of up-keep of the property; that between June, 1941, to the date of the vesting order above mentioned Shoso Nii acted under and through his attorney-in-fact Katsutoshi Mikami who held a duly executed and recorded power of attorney signed by Shoso Nii which is in evidence in this cause;

(b) That during Shoso Nii's visit to Japan in 1941 he was unable to return to Hawaii because of

the intervening war; that he returned to Hawaii on November 8, 1947; that during said period June, 1941, to November 8, 1947, he was a resident of the Territory of Hawaii; that at the time of filing of this suit Shoso Nii was a resident of the Territory of Hawaii;

(c) That appellant, Shoso Nii, on or about 1928 graduated from the eighth grade of Waipahu Elementary School and made application for registration at the Kalakaua Junior High School in Honolulu; that he was accepted for enrollment by the said Kalakaua Junior High School; that he did not continue his studies there but instead helped Kaneichi Nii, his father, at said Kaneichi Nii's store; that said Kaneichi Nii at said time and repeatedly thereafter promised Shoso Nii all of said Kaneichi Nii's property in Hawaii at the time of said Kaneichi Nii's death or if said Kaneichi Nii left for Japan if Shoso Nii left school and helped at the said store; that the fact that there was such an agreement is corroborated by the testimony of Mr. Ikinaga and by the evidence of written entries made in the books of the Waipahu Garage, Ltd., a corporation in which Kaneichi Nii was a record stockholder up to 1939 showing that in spite of the fact that Kaneichi Nii remained the record stockholder, Shoso Nii received dividends in the name of Shoso Nii up to the time of the change of the stock record; that said Shoso Nii relied on said promise and gave up going to school and without any wages put in long hours of work every day including Sundays helping at the Kaneichi Nii's store up to January 2, 1933;

(d) That as of January 2, 1933, Kaneichi Nii, the father, desired to partially and prematurely execute the aforementioned promise and made a gift of the father's store located at Waipahu to Shoso Nii; that Kaneichi Nii made, executed and delivered a bill of sale which was duly recorded, and effectively made a gift of said store to said son; that bank accounts in the name of the father at the Waipahu Branch of the Bank of Hawaii were also transferred to the son when the bill of sale was made;

(e) That on the 17th day of December, 1932, said Kaneichi Nii made and signed a document purporting to be a will in accordance with the promise aforementioned in subparagraph (c) bequeathing all of his properties, both real and personal, to the appellant;

(f) That appellant in reliance on the promise aforementioned in subparagraph (c) built two (2) two-bedroom houses on the premises in dispute and a substantial stone wall to keep the water of the Waipahu River from flooding the premises at the total expense to him of about \$3,000.00;

(g) That in 1938 the appellant negotiated for the purchase of the second and smaller parcel of real estate which is part of the property involved in this proceeding and serves as a right of way to the larger parcel in dispute; that the appellant was able to direct the form and in whose name this deed was to be executed; that the appellant caused title to the second parcel of real estate to be taken in the name of

his father, Kaneichi Nii, because the right of way was to be appurtenant to the main parcel; that appellant at that time knew that title to the larger parcel of real estate was in the name of his father, Kaneichi Nii; that the entire consideration for the small parcel was paid by Shoso Nii;

(h) That subsequent to May, 1935, up to the date of the vesting order, appellant had possession of the premises in dispute; his tenants lived on the premises in dispute;

(i) That for more than ten (10) years continuously and without interruption appellant had the open, exclusive, adverse and continuous possession of the premises in dispute;

(j) That in 1935 just before Kaneichi Nii's departure to Japan said Kaneichi Nii orally told Shoso Nii he did give all of his properties to the appellant; that said gift was in accordance with the promise aforementioned in subparagraph (c);

(k) That appellant's father had to leave for Japan in 1935 sooner than he had expected rather suddenly because of the sudden aggravation of the illness of his daughter who was then ill in Japan; that the fact that she was ill is well established by the testimony of her husband Jinichi Tsumoto;

(l) That because Kaneichi Nii had to depart suddenly for Japan in 1935, no deed of any nature whatsoever was executed by Kaneichi Nii; that there was another parcel of property in Waipahu which re-

mained in the name of Kaneichi Nii close to the property in dispute; that in 1940 Shoso Nii sold this property to Attorney Oliver Kinney and kept for himself the consideration paid by said Attorney Oliver Kinney.

9. That the Court erred in refusing at the end of the case to permit the appellant to file his amended complaint to amend his complaint to meet the proof in the case.

SUMMARY OF ARGUMENT.

1. Since Alien Property Custodian does not depart with valuable consideration the acquisition of title by way of vesting does not make Alien Property Custodian a bona fide purchaser or one equivalent thereto under Hawaiian Recording Statute. Rule of constructive notice of possession by beneficial owner also applies to Alien Property Custodian.

2. Since appellant was in open, exclusive, adverse, continuous and uninterrupted possession of large parcel for more than 10 years appellant was owner thereof by way of adverse possession.

3. There was an overwhelming amount of evidence in support of appellant's contention of parol gift of the larger parcel and Court erred in holding that appellant did not prove his beneficial interest in the larger parcel. That with relation to the smaller parcel the law of resulting trust applied and appellant was by reason thereof beneficial owner.

4. Appellant should have been permitted to amend complaint under Rule 15 (b) of the Rules of Civil Procedure to meet the proof in the case.

5. That the issuance by the trial Court of the "Order Directing Accounting and Payment Under Section 17, Title 50 U.S.C.A. as Amended" (Tr. pp. 160-161) was in error in that the "Judgment Order" (Tr. p. 158) fully covered the situation and furthermore once the trial Court went into the merits of the case it lost its jurisdiction under Section 17 aforementioned to issue the said order.

ARGUMENT.

I.

ALIEN PROPERTY CUSTODIAN DOES NOT STAND IN SAME POSITION AS A BONA FIDE PURCHASER FOR VALUE UNDER HAWAIIAN RECORDING STATUTES.

It is respectfully submitted that the Alien Property Custodian does not stand in a same position as a bona fide purchaser under the Hawaiian recording statutes. The trial Court found that with respect to the lands involved in this case, the titles to both properties were not Land Court titles. (Tr. p. 147.) Therefore, the only applicable provision in this case is Section 12756 of the Revised Laws of Hawaii 1945, which reads as follows:

"All deeds, leases for a term of more than one year, or other conveyances of real estate within the Territory, shall be recorded in the bureau of

conveyances. Every such conveyance not so recorded shall be void as against any subsequent purchaser, in good faith and *for a valuable consideration*, not having actual notice of the conveyance, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded."

The Alien Property Custodian or his successors are certainly not purchasers for a valuable consideration. In their act of vesting they do not depart with any valuable consideration. Even when the Territory of Hawaii exercises its powers of eminent domain, it does not rely on the record title. Section 311 of the Revised Laws of Hawaii 1945 provides for notices by publication and Section 312 permits intervention by interested parties. Section 313 provides as follows:

"The court shall have power to determine all adverse or conflicting claims to the property sought to be condemned and to the compensation or damages to be awarded for the taking of the same."

It has been repeatedly held that Alien Property Custodian can take under its vesting powers no more than what the alien enemy had. In *U. S. v. San Leonardo*, 51 F. Supp. 107, the Court held:

"The Alien Property Custodian could not however, take any greater interest in property seized than the alien enemies had * * *"

See: *Reising v. Deutsche*, 15 F. (2d) 259; *Miller v. Robertson*, 266 U.S. 243, 45 Sup. Ct. 73; *Von*

Schwerdtner v. Piper, 23 F. (2d) 862; *In re Knutzen's Estate*, 191 P. (2d) 747; *In re Carrington's Estate*, 81 N.Y.S. (2d) 77. Furthermore, in construing the Trading with the Enemy Act it must be kept in mind that it is the dominant purpose of the Trading with the Enemy Act to give citizens an adequate remedy for invasions of their property rights in exercise of the war powers of the government. *Pflueger v. U. S.*, 121 F. (2d) 732.

It is therefore submitted that the Alien Property Custodian is not in an identical, same or similar position as a bona fide purchaser.

Even if the Alien Property Custodian's status were equivalent to that of a bona fide purchaser still the appellant was in exclusive possession of the premises through his tenants (Tr. p. 321) and the Alien Property Custodian took with constructive notice. In *Yee Hop v. Young Sak Cho*, 25 Haw. 494, the Supreme Court of Hawaii held with respect to Section 12756 of the Revised Laws of Hawaii 1945 (the statute then in effect being identical):

“The general rule is that when a party purchases or leases real estate in the possession of another not his vendor or lessor he is chargeable with knowledge of all the rights of the party in possession.”

In the situation where legal title to a patent remains in an enemy alien and the Alien Property Custodian vests said patent, it is never argued and no Court has ever held that the Alien Property Custodian is a bona

fide purchaser. Instead, the legal title to the patent will be returned to one who proves beneficial ownership. *Rudenberg v. Clark*, 72 F. Supp. 381. The situation in the present case is identical.

Under the authorities and statutes above cited, it is submitted that the trial Court's holding that "the Custodian stands in the same position as a bona fide purchaser for value, thus cutting off any and all equities * * *," was in compete error.

II.

COURT'S REFUSAL TO MAKE A FACT FINDING REGARDING ADVERSE POSSESSION WAS ERRONEOUS AND THIS COURT SHOULD MAKE FINDING OF ADVERSE POSSESSION.

On December 15, 1948, forty-two days before the trial Court made its fact findings the appellant filed a "Motion for Findings of Facts" (Tr. pp. 137-144) and in Paragraph 18 thereof requested the following finding:

"18. That for more than ten (10) years continuously and without interruption plaintiff had the open, exclusive, adverse and continuous possession of the premises in dispute." (Tr. p. 143.)

The Court completely ignored this request and did not make any fact finding in spite of the following allegation in the plaintiff's complaint:

Paragraph VII * * * "that subsequently to May 1935, for more than 10 continuous years, the

plaintiff took possession of the premises and openly, exclusively, adversely, continuously and without interruption held himself to be the owner of the premises aforescribed against the entire world; that since May 1935, he possessed said property and collected all rentals due from the premises and kept the said rentals for his own use; that since May 1935, he paid all Territorial real property taxes on the premises; that since May 1935 he considerably improved the premises with permanent improvements at his own labor and expense; that since May 1935, he controlled the property in every respect as if he owned the property * * *” (Tr. p. 6.)

Appellant has in Paragraph 8 (i) reserved this point in his “Statement of Points.” (Tr. p. 492.)

Under the Territorial laws, the period of continuous possession required is 10 years. See Section 10439 of the Revised Laws of Hawaii 1945 which reads as follows:

“Sec. 10439. Ten years. No person shall commence an action to recover possession of any lands, or make any entry thereon, unless within ten years after the right to bring such action, first accrued.”

In *MacFarlane v. Damon, et al.*, 10 Haw. 495, the Court held that a parol gift of land following adverse possession for a period longer than the statutory period aforementioned cannot be disturbed. In view of this Hawaiian decision, it is difficult to see how the Court could have completely ignored appellant's request.

It is respectfully submitted that this Court has jurisdiction to make fact findings in an equity case on appeal upon the evidence presented where the trial Court did not make fact findings. *Howarth v. McCord Radiator and Manufacturing Co.*, 100 F. (2d) 326.

The evidence below supporting adverse possession as to the larger parcel in dispute was not only parol but was adequately supported by documentary evidence by way of Tax returns introduced in evidence. (Tr. pp. 413-442.) The undisputed and uncontradicted testimony of the appellant was that the appellant collected all rentals from the property in dispute, paid all Territorial real property taxes from May 1935 to September 1947. (Tr. p. 321.) This is supported by the further uncontradicted testimony of Henry Jinichi Tsumoto (Tr. p. 195) and Shigeo Matsuura, the accountant. (Tr. pp. 264-292.) The accountant testified that the appellant's net income tax returns for 1938 to 1947 reflected rentals collected by appellant for the said years from the large parcel in dispute herein (Tr. p. 277) and also real property taxes paid by appellant. (Tr. pp. 278-279.)

It is submitted that upon the evidence submitted this Court find that appellant by his 10 years of continuous uninterrupted, open, exclusive and adverse possession of the large parcel in dispute was the owner thereof and the appellee be ordered to return said property to the appellant.

III.

DID THE TRIAL COURT ERR IN HOLDING THAT THERE WAS
NOT SUFFICIENT EVIDENCE TO SUPPORT A PAROL GIFT
OF REAL ESTATE?

It is respectfully submitted that on the evidence submitted in the trial Court below, the Court seriously erred in holding that there was no parol gift of realty with relation to the larger parcel.

This case is equitable in nature and must be considered as an equity suit. See *Standard Oil Co. v. Clark*, 163 F. (2d) 917 (cert. den.), 333 U.S. 873, 68 S. Ct. 901. Furthermore Section 9(a) under the Trading with the Enemy Act, 50 U.S.C.A. Sec. 9a, provides that suits for return of property shall be in equity.

It is submitted that generally in considering equity cases on appeal, the reviewing Court is not required to accept fact findings of the trial Court on disputed issues in the same sense that it accepts a jury's verdict in a law action respecting an issue over which there is a dispute and if on the whole record the evidence decidedly preponderates against the findings of the trial Court, the reviewing Court is not bound by such findings. *Howarth v. McCord Radiator and Manufacturing Co.*, 100 F. (2d) 326. In an appeal in equity, the Circuit Court of Appeals reviews the facts as well as the law and the review is a real review and not a perfunctory approval. *National Manufacturers and Stores Corp. v. Whitman*, 93 F. (2d) 829. While there is a presumption that the trial Court decided a question of evidence correctly, the judg-

ment must be reversed where the finding of the Court is clearly without support. *Aetna Life Ins. Co. v. Kern-Bauer* (C.C.A. 10), 62 F. (2d) 477. It is true that this Court in *Chas. V. Lilly Co. v. I. F. Laucks* (C.C.A. 9), 68 F. (2d) 175, held that in an equity appeal if the evidence is conflicting fact findings will not be disturbed *unless there is an obvious mistake of fact*.

But it is submitted that where the evidence mainly relied upon by the trial Court, as in the present case, was by way of a deposition the same rule should not be applicable and this Court may draw its own inferences and make fact findings from the deposition. In *Africa Maru* (C.C.A. 12), 54 F. (2d) 265, the Court held that where the evidence in the trial Court was by depositions, the Court on appeal will examine the depositions to determine the weight of the evidence. See also *Midland Flour Milling Co. v. Babbitt* (C.C.A. 8), 70 F. (2d) 416, where it was held that findings of fact based on depositions are not entitled to the same weight which they would have had if the witness had testified in open Court. See also *Anderson v. Baldwin Law Publ. Co.* (C.C.A. 6), 27 F. (2d) 82.

The rule that an Appellate Court will itself weigh findings based on depositions and is not bound by the findings of the trial Court is similarly applied to fact findings made on documentary evidence. In *Kind v. Clark*, 161 F. (2d) 36, the Court held:

“In so concluding we rely on the documentary evidence which we are in as good a position as the trial judge to determine.”

See also: *Globe-Union v. Chicago Telephone Supply Co.*, 103 F. (2d) 722; *Cuttler-Hammer, Inc. v. Chicago Telephone Supply Co.*, 103 F. (2d) 732; *Letcher County, Ky. v. De Foe*, 151 F. (2d) 987; *Sun Ins. Office of London v. Be-Mac Transport Co.*, 132 F. (2d) 535; *Equitable Life Assur. Soc. of U. S. v. Irelan*, 123 F. (2d) 462; *Banister v. Solomon*, 126 F. (2d) 740; *Johnson v. Griffiths S. S. Co.*, 150 F. (2d) 224, and *Bowles v. Beatrice Creamery Co.*, 146 F. (2d) 774.

The trial Court seized and based its decision on the following question and answer of appellant's father whose deposition taken before the American Consul at Kobe, Japan, was read into the record (Tr. pp. 210-220):

“Question 13. What did you do with all of your real properties in Hawaii when you last left Hawaii for Japan?”

“Answer. After returning to Japan, I made a power of attorney to Shoso Nii at the American Consulate about December, 1935, to dispose of *my properties* in Hawaii.” (Emphasis ours.) (Tr. pp. 213-214.)

The question and answer was allowed over *appellee's* objection. It is interesting to note that the order permitting the taking of the deposition (Tr. pp. 30-31) permitted the appellee to propound cross interrogatories and recross interrogatories but appellee defaulted by permitting time to lapse and permitted the deposition to be taken only on the direct questions of the appellant. In other words the answer to ques-

tion 13 aforementioned was not only objected to by the appellee but later became a "windfall" benefit to the appellee, much to appellee's surprise.

In the Court's Opinion (Tr. p. 156) the Court stated:

"May be the father misled the son, but the uncontradicted evidence is that the father states he gave the son a power of attorney to deal with 'my' property in Hawaii and the plaintiff accepted it and acted under it."

The Court without doubt based its entire opinion on the words "my property". *In one sense the property was the father's because the legal title was in his name, but the beneficial interest was in the appellant.* The appellant was caught short on a deposition taken by him by a narrow interpretation given it by the Court. The Court closed its eyes to the testimony with relation to beneficial interest referred to in the preceding "Statement of the Case" and the Court shunned the overwhelming documentary proof supporting the appellant's case. The same trial judge in *Fujino v. Clark*, 71 F. Supp. 1, affirmed by this Court in 152 F. (2d) 384, held that:

"* * *, it is permissible to look through and beyond the technicalities of the law of conveyancing to the realities * * *. Family arrangements are subject to close examination, and *factual control is more significant than the niceties of legal title.*" (Emphasis ours.)

Now that the shoe is on the other foot, must sound legal theories be forgotten because parties have interchanged?

The Court's finding that the statement of the appellant's father "my property" is "*uncontradicted*" is difficult to follow because all of the rest of the evidence parol and documentary contradicts it. From the very deposition on which the Court puts much reliance on it appears that the deposition was made on an English to Japanese and Japanese to English translation, that the deponent was of a feeble age of 71, that he stated that there was no bill of sale to the store which is absolutely contrary to the documentary evidence in the case, that the date he gives for the power of attorney, December 1935, is absolutely erroneous in that the power of attorney was made on February 7, 1939. (Tr. pp. 210-217.) In spite of these glaring misstatements by a 71-year old non English speaking alien Japanese—the Court chose to make its entire decision on the ambiguous words "my properties" and closed its eyes to better evidence before it. It must be remembered that the appellant is a United States citizen and his property was taken and the Trading with the Enemy Act already imposes a burden on him to prove his case to recover the property. The trial Court by deciding the case in the way it did not only increased his already unfair burden but made the burden impossible by its very narrow interpretation of the words "my property."

Depositions should be scanned with great care, *Smith v. Smith*, 25 N.Y.S. (2d) 448, 261 App. Div. 930. The Court in considering a deposition, appraises effect of any answer by its proper context and should

decline to attribute to a manifestly inept and inadvertent answer a significance that is conclusively negated by its entire setting, *U.S. ex rel. Lawrence v. Commanding Officer of McCook Army Air Field*, 58 Fed. Supp. 933.

Furthermore, the testimony of witnesses Ikenaga, Kinney, Tsumoto and Matsuura which was not impeached or contradicted cannot be disregarded by the trial Court. *San Francisco Ass'n. for the Blind v. Industrial Aid for the Blind*, 152 F. (2d) 532, *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 51 S. Ct. 453, 75 L. Ed. 983.

The law of parol gift of real estate is well settled in Hawaii. In *Vierra v. Shipman*, 26 Hawaii 269, the facts were that one Baker, who owned certain real estate with cattle and other personalty thereon, together conducted as a cattle ranch, promised Vierra that if he would accept employment on said ranch and perform certain services thereon from that time until Baker's death, without wages and without compensation other than his food and clothing, he, Baker, would devise and bequeath to him the said ranch. Vierra accepted the employment and performed all the services during the remainder of Baker's life, fully and satisfactorily to Baker. At the time of entering into the undertaking Vierra was sixteen years of age and planned to take, if possible, a course in agriculture. The performance of his duties on the ranch necessarily rendered impossible any course of study as planned. It was held that under these circumstances there was part performance and that

Baker's promise is enforceable in equity. The Court commented:

"His situation is now entirely changed. The opportunity for study with the enthusiasm of youth and without the influences that have necessarily been exercised upon him by his occupation on the ranch is irretrievably lost. * * * Courts of equity will not permit the statute of frauds to be so applied as to make it an instrument of fraud."

The appellant will also be "misled" and his education irretrievably lost if the trial Court's decision is followed. In fact the trial Court states "May be the father misled the son". (Tr. p. 156.) *It is for this type of misleading that a Court of Equity steps in and prevents injustice.*

There is abundant evidence of permanent improvements made by the appellant relying on his father's representations. Two houses and an outhouse at an expense greater than the original price of the lot were built by the appellant. (Tr. pp. 318-319.) A wall to keep the Waipahu river was built also by the appellant. In *Yee Hop v. Young Sak Cho*, 25 Hawaii 494, the Court in specifically enforcing a parol agreement to give a lease stated:

"Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements where there has been part performance for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the statute of

frauds, after the other party to the contract has, *upon the faith of such engagements expended his money or otherwise acted in execution of the agreement.* Under such circumstances the court will prevent such injustice from being effected.”

In *Mackall v. Same*, 135 U. S. 167, 10 S. Ct. 705, the Court following the same doctrine stated:

“A party who receives a parol gift of real estate, enters into possession and expends money in improvements thereon, presents equitable considerations which will uphold a decree establishing a subsequent conveyance as a confirmation of his equitable title.”

At this point it is important to note that the appellee did not plead the Statute of Frauds as is required by Rule 8C of the Federal Rules of Civil Procedure.

The trial Court throughout its Findings of Fact (Tr. pp. 145-151) and Opinion (Tr. pp. 153-157) appears to have been uncertain with relation to the proof of beneficial interest and no where in the Fact Finding or the Opinion does it expressly make a finding. On page 153 of the transcript (7 lines from the bottom) the words “do not bring a conviction” are used. And on page 156 at the bottom it is stated that the trial Court is not satisfied by the use of the following dubious language:

“And even if I were satisfied with the plaintiff’s story—which I am not—as to the larger parcel and also as to the smaller one * * * plaintiff cannot here recover is that the Custodian was entitled to rely upon the record title.”

It is submitted that a trial Court must find or not find facts with certainty and not make excuses to find facts in a dubious manner straddling on unfounded doctrines of bona fide purchasers. The very fact that the trial Court straddled the question shows that it was not certain of its dubious fact findings.

As for the smaller parcel, 2072 square feet, purchased by the appellant on July 23, 1938 together with the right of way over 526 square feet lot, the case is clearly one of resulting trust. The entire consideration was paid by the appellant. (Tr. pp. 323-324.) In *Ishida v. Naumu*, 34 Haw. 363, the Court held:

“ ‘An express trust is created only if the settlor manifests an intention to create it * * * although the manifestation may be made by written or spoken words or by conduct * * * A person who seeks to establish the existence of an express trust must show that the settlor manifested an intention to create it. On the other hand, in the case of a resulting trust it is not necessary to show that the settlor manifested an intention to create it. A person who seeks to establish the existence of a resulting trust does so by showing circumstances which raise an inference that the person making or causing a transfer of property did not intend to give to the transferee the beneficial interest in the property. Since the transferee is not to have the beneficial interest and since no other effective disposition is made of it, the person who made or caused the transfer of his estate is entitled to it. A resulting trust is imposed for the purpose of carrying out what it appears from the circumstances under which

a disposition of property is made would probably have been the intention of the person making the disposition if he had thought of the matter. * * * If a person purchases property but takes title in the name of another, the inference is that he did not intend the transferee to have the beneficial interest, but that the transferee should hold the property for the benefit of the purchaser. * * * The trustee of a resulting trust, like the trustee of an express passive trust, is ordinarily under a duty merely to convey the property to the beneficiary or in accordance with his directions * * * Thus, if a transfer of property is made to one person and the purchase price is paid by another, it is the duty of the transferee to convey the property to the person who paid the purchase price whenever he demands such conveyance. * * * A resulting trust arises where a transfer of property is made under circumstances which raise an inference that a person making a transfer or causing a transfer to be made did not intend the transferee to have the beneficial interest in the property transferred.' Restatement, Trusts, pp. 1246-1249."

It is respectfully submitted that for the reasons stated and under the authorities cited appellant proved his interest in both parcels by the overwhelming evidence.

IV.

RULE 15 (b) PERMITS AMENDMENTS TO PLEADINGS
TO CONFORM TO PROOF.

The appellant before the trial of the cause by a written motion supported by affidavit (Tr. pp. 110-113) offered an amended complaint (Tr. pp. 113-126) to meet the proof in the case. The motion was denied by the trial Court. (Tr. p. 176.) After the trial of the cause the motion was renewed but again the Court refused the amendment. (Tr. p. 397.)

It is submitted that the trial Court should have allowed the amendment to conform the pleadings to the evidence which was adduced at the trial. The main change in the complaint is the allegations in paragraph V with relation to the promise to give all of the properties in Hawaii and the reliance thereon by the appellant. (Tr. p. 115.)

Rule 15 (b) reads as follows:

“Rule 15 (b). ‘Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so

freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

It is a liberal rule and the trial Court should have permitted the amendment in view of the fact that it allowed evidence to support appellant's allegations in the amended complaint.

V.

**THAT TRIAL COURT HAD NO JURISDICTION TO ISSUE THE
"ORDER DIRECTING ACCOUNTING AND PAYMENT UNDER
SECTION 17, TITLE 50 U.S.C.A. AS AMENDED".**

The "Order Directing Accounting and Payment Under Section 17, Title 50 U.S.C.A. as Amended" requires the appellant to pay on or before February 23, 1949 the total sum of \$3,169.01. (Tr. p. 161.) The "Judgment Order" merely requires the appellant to "account for and pay over" on or before February 23, 1949 the net income from the vested property. (Tr. p. 160.)

It is submitted that both Section 17 and Section 9 (a) of the Trading with the Enemy Act are parts of the same act and they should be construed in the light and purpose of the act.

If the amount ordered to be paid under the Section 17 order (\$3,169.01) is more than the amount finally

determined under the "Judgment Order", must the appellant pay the \$3,169.01? The issuance of two orders will result in a confusion. The "Judgment Order" made on the merits of the case was all that was necessary and once a Court goes into the merits of a case the necessity of a Section 17 order is dispensed.

CONCLUSION.

It is respectfully submitted that the "Judgment Order" and the "Order Directing Accounting and Payment Under Section 17, Title 50 U. S. C. A. as Amended" of the Court below should be reversed and an appropriate order be entered by this Court ordering the return of appellant's properties.

Dated, Honolulu, Hawaii,
September 14, 1949.

Respectfully submitted,

SHIRO KASHIWA,

Attorney for Shoso Nii, Appellant.



No. 12212

**In the United States Court of Appeals
for the Ninth Circuit**

SHOSO NII, *appellant*

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO
THE ALIEN PROPERTY CUSTODIAN, *appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE TERRITORY OF HAWAII

BRIEF FOR APPELLEE

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12212

SHOSO NII, *Appellant*

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO
THE ALIEN PROPERTY CUSTODIAN, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE TERRITORY OF HAWAII

BRIEF FOR APPELLEE

OPINION BELOW

The opinion of the District Court (R. 153-157) is reported at 81 F. Supp. 1003.

JURISDICTION

The jurisdiction of the United States District Court for the Territory of Hawaii was founded upon Sections 9 (a) and 17 of the Trading With the Enemy Act, 40 Stat. 411, as amended (50 U. S. C. App. §§ 9 (a), 17). The judgment of that Court was entered on January 27, 1949 (R. 158-159). Notice of Appeal was filed February 23, 1949 (R. 162). The jurisdiction of this Court is founded upon Section 1291 of Title 28 of the United States Code.

STATEMENT

Appellant brought this suit under Section 9 (a) of the Trading With the Enemy Act to recover two parcels of real property situated in the City and County of Honolulu, Territory of Hawaii. These parcels were vested pursuant to that Act by the Attorney General of the United States, as successor to the Alien Property Custodian,¹ upon a finding that they were the property of Kaneichi Nii, father of appellant, and a citizen and resident of Japan. The Attorney General filed a counterclaim under Section 17 of the Act, demanding payment of all rents collected by appellant from the properties together with interest thereon. The United States District Court for the Territory of Hawaii, Honorable J. Frank McLaughlin presiding, dismissed the Section 9 (a) suit and ordered appellant to pay over to the Attorney General the net income from the vested property. The facts, as found by the District Court and as shown in the record, may be summarized as follows:

Appellant was born in 1914 in the Territory of Hawaii and is accordingly a citizen of the United States (Fdg. 10, R. 147). In early 1941 he sent his wife and four children to Japan to live with his father and mother, both subjects of Japan, and one sister. After getting permission from his local Se-

¹ By Executive Order No. 9193, 7 F. R. 5205, the vesting power was delegated to the Alien Property Custodian. By Executive Order No. 9788, 11 F. R. 11981, the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief the terms "Alien Property Custodian" or "Custodian" will sometimes be used to refer generally to both the Alien Property Custodian and to the Attorney General as his successor.

lective Service Board to visit Japan for five months, he followed his family on June 26, 1941 (Pl. Ex. No. E-1, R. 443-445), taking his other sister with him (R. 327). He lived in Japan with his father from 1941 until October 1947 (Fdg. 10, R. 147-148). From June 1941 no member of appellant's family was in Hawaii until November 8, 1947, when he returned (R. 296, 327). At the time of bringing this action appellant resided at Waipahu, Oahu, Territory of Hawaii (Fdg. 10, R. 147; R. 292).

Kaneichi Nii was born in Japan and lived there for thirty years before coming to Hawaii. After spending about twenty-six years in Hawaii Kaneichi returned to Japan in May of 1935 and has since remained there (Fdg. 5, R. 146; R. 212). During his years in Hawaii Kaneichi acquired considerable property, including a general merchandise store (R. 51), the larger parcel of land here in dispute, three other parcels of "rental property" (R. 302-304, 321), and 311 shares of stock in Waipahu Garage Co., Ltd. (R. 333).

Appellant was graduated from the Waipahu Elementary School in 1928. Thereafter, he worked in his father's store (R. 298-299). Appellant testified that he went into the store with his father upon the latter's promise to give him "everything that he owned in the Territory" (R. 299) when his father should die or leave Hawaii (R. 300). At that time Kaneichi owned neither of the properties whose return appellant now seeks.

In December, 1932 Kaneichi executed a will purporting to devise and bequeath all of his property, real

and personal, wherever situated, to appellant (Pl. Ex. P, R. 461-462).² The will makes no reference to any agreement to dispose of any property prior to Kaneichi's death (*Ibid.*). And, as the court below said, the will "oddly issues out of" the possession of the sole beneficiary (R. 154), despite the fact that it appears that the father is still alive, that the son did not have permission to publish the will, and that he does not know whether it has been revoked (R. 343).

On January 2, 1933, Kaneichi executed a bill of sale conveying his store to appellant (D. Ex. No. 1, R. 51-52; R. 308). At the same time Kaneichi put in appellant's name a savings account (R. 309) which the court below concluded was the store's account (R. 155). From the time the store was turned over to appellant he collected the rentals on all of his father's property in Hawaii and paid the real estate and income taxes thereon (R. 321). In other words, although he then neither owned nor claimed to own any property other than the store, he managed all of his father's properties.

In May 1935 appellant's father and mother left Hawaii for Japan (R. 212). The night before their departure appellant and his wife had dinner with appellant's parents (R. 299). Appellant testified that, at that time and in the presence of all these persons, Kaneichi "gave me all [his] property in the Territory" (R. 364). Kaneichi then owned the larger parcel of land here at issue (but not the smaller one) and 311 shares of the Waipahu Garage Co., Ltd. (R. 333).

² At that time Kaneichi still did not own either of the properties here involved.

Of the four persons who were present at this alleged conversation only the appellant testified as to the fact of its occurrence or as to its nature. Appellant's wife was not called to testify; and no deposition was taken from his mother in Japan. Although appellant had his father's deposition taken in Japan (Pl. Ex. B, R. 210-221), Kaneichi, when asked what he did with his real properties before leaving for Japan, answered (R. 214) :

After returning to Japan, I made a power of attorney to Shoso Nii at the American Consulate in Kobe about December 1935, to dispose of *my properties* in Hawaii.³ [Emphasis added.]

By that answer Kaneichi made it clear that he did not consider that he made a gift of the real property before leaving Hawaii. It also appears that record title to both items of real property remained in Kaneichi's name from their respective dates of purchase⁴ until

³ After the conclusion of the trial, appellant moved to reopen the case for the taking of an additional deposition of Kaneichi because of an alleged misinterpretation of his answers (R. 128-129). The interpreter for that deposition, however, was appellant's sister, Florence Nii (R. 218). It is only reasonable to assume that she made as favorable translations as she could, while still translating honestly her father's statements. The court below was of that opinion and denied the motion (R. 156; see also R. 132-136).

⁴ The larger parcel was acquired by Kaneichi by deed dated and recorded in his name on December 27, 1932 (Fdg. 7, R. 146). Although the smaller parcel was not acquired until more than three years after Kaneichi's return to Japan, that title was also recorded in his name (Fdg. 7, R. 146-147). Because appellant felt it necessary to record that title in his father's name, it seems apparent that he paid for the property out of income which he received from other properties of his father. Clearly, if appellant

vesting (Fdg. 8, R. 147) and that the real estate taxes were at all times prior to vesting paid in the name of Kaneichi (Fdg. 9, R. 147). There is nothing in the record to show that a gift tax return was ever filed or gift tax paid on the alleged transfer by gift.

The power of attorney to which Kaneichi referred in his deposition was a general power, prepared by appellant (R. 329-330), executed by Kaneichi in favor of appellant on February 7, 1939, and recorded in the Bureau of Conveyances of the Territory of Hawaii on February 27, 1939 (R. 60-68). The power was first employed to transfer Kaneichi's 311 shares in Waipahu Garage Co., Ltd., to appellant on April 7, 1939 (R. 333).⁵ The power of attorney was used as late as the spring of 1941, when appellant sold another piece of his father's real property in his father's name (R. 302-304). Even then, however, although title to both pieces of land here in dispute remained in his father, appellant did not use the power of attorney to transfer record title to himself.

During almost the entire six years (1941-1947) that appellant was in Japan, appellant, his wife and his four children were supported altogether by Kaneichi (R. 326). During that whole period he was of course aware that record title to the properties in question

were already the owner of the larger, adjoining parcel and had paid for the property with his own funds, as he claims (Appellant's Brief, p. 8), there is no conceivable reason why he should not have made the purchase in his own name.

⁵ Dividends on this stock were paid to Kaneichi Nii through August 1936, more than a year after the alleged gift of "everything" in Hawaii to Shoso (R. 334-335).

was in his father (R. 330). Nevertheless, he never called that fact to his father's attention (R. 380), nor did he at any time request any document which would transfer title of the property to him (R. 330).

On September 12, 1947, the Attorney General vested the parcel of real property bought by Kaneichi in 1932 and the parcel bought by appellant in Kaneichi's name in 1938, upon a determination that Kaneichi was the owner of both and was a national of a designated enemy country (Japan) (R. 13-18). The Attorney General also vested the obligation owing to Kaneichi by appellant, arising out of rents collected from the vested property (*Ibid.*). On December 31, 1947, appellant filed suit pursuant to Section 9 (a) of the Trading With the Enemy Act, claiming a gift of the properties to him in 1935, seeking their return, and asking that appellee be enjoined from collecting the alleged debt (R. 1-13). In his answer filed May 3, 1948 appellee included a counterclaim seeking payment of the vested debt pursuant to Section 17 of the Act (R. 20-25). The District Court ruled on November 19, 1948 that the counterclaim, based on the turn-over directive, should be settled at the same time as the principal claim (R. 109).

A few minutes before the trial was scheduled to begin appellant moved to amend his complaint, without, he said, changing the basic cause of action or his contention "that it was a gift" (R. 175). But the Court found the changes to consist principally of "pleaded evidence" and so denied the motion (R. 175-176). This motion was repeated at the close of the

trial and again denied (R. 397). After trial, the Court concluded that appellant

. . . failed to establish his interest in the vested property in that his claim to having had at the date of vesting an equitable title by way of gift to the larger tract is not supported by convincing satisfactory evidence. (R. 151.)

The Court further held that (R. 151-152):

As to both parcels, the record title to each upon the date of vesting stood in the father's name, and the Custodian stands in the same position as a bona fide purchaser for value, thus cutting off any and all equities which the [appellant] might otherwise have had against his father with respect to the vested property.

Upon the counterclaim the Custodian was held entitled to recover all rents collected by appellant from the premises for the period May 1935 to September 12, 1947 (R. 152).⁶

SUMMARY OF ARGUMENT

In this suit under Section 9 (a) of the Trading With the Enemy Act, appellant seeks return of two parcels of real estate vested by the Custodian as property owned by a national and resident of Japan, appellant's father.

⁶ The total amount due upon the counterclaim has not yet been computed. The court below directed appellant to pay over \$3,169.01 which the Custodian had demanded in his turn-over directive, issued August 20, 1948, for rents received between July 1, 1941, and September 12, 1947 (R. 101-103); the Court also directed appellant to account for and pay over rents for the period May 1935 to July 1, 1941 (R. 152).

To reverse the judgment below, appellant would have to demonstrate that the findings of the trial court were "clearly erroneous." Rule 52 (a) of the Federal Rules of Civil Procedure. But appellant's theory of a gift of the land to him rests on his own unsupported testimony which indeed is squarely in conflict with the deposition of his father, the alleged donor. Circumstantial evidence was also strongly against appellant. Beginning in 1933 appellant managed his father's properties in Hawaii, collecting the rent, paying taxes, and generally acting as his father's agent. There was no apparent change in this relationship after 1935, when the gift was allegedly made. Appellant never disturbed the record title in his father, although he later procured a power of attorney from his father and used it to make other conveyances of his father's property.

Even if a parol gift of the property to appellant had been contemplated, still the Statute of Frauds would prevent its enforcement. Nor does the case come within any exception to the Statute. Further, assuming no violation of the Statute of Frauds, the absence of a recorded conveyance was fatal. As the court below held, ". . . the Custodian was entitled to rely upon the record title in the same manner and to the same extent as a bona fide purchaser would have been." Nor can appellant rely on title by adverse possession since his possession was not hostile to that of his father, but in subordination thereto.

Appellant's objections to the Court's order on the counterclaim are without merit.

ARGUMENT

- I. The conclusion of the District Court that appellant "failed to establish his interest in the vested property" is supported by the overwhelming weight of credible evidence and should therefore be affirmed as not "clearly erroneous"

To recover under Section 9 (a) of the Trading With the Enemy Act, the plaintiff must establish that he was the owner of the property prior to vesting. It is settled that the burden of proof is on the plaintiff. *Thorsch v. Miller*, 5 F. 2d 118, 122-123 (App. D. C.); *Von Zedtwitz v. Sutherland*, 26 F. 2d 525, 526 (App. D. C.); *Sturchler v. Hicks*, 17 F. 2d 321, 322 (E. D. N. Y.). Appellant's offer of proof at the trial to meet that burden went on the theory that he was entitled to the larger parcel of land by virtue of a parol gift from his father, and that he was entitled to the smaller parcel by virtue of a resulting trust in his favor. The court below concluded that, as to the larger piece of land, appellant "failed to establish his interest in the vested property . . . by convincing satisfactory evidence" (R. 151); and the Court likewise rejected appellant's claim of a resulting trust. As a consequence of that holding, appellant, in seeking to reverse the judgment below, is confronted with the additional burden of establishing that the findings of the trial court were "clearly erroneous." Rule 52 (a) of the Federal Rules of Civil Procedure. The scope of that rule has been recently examined by the United States Supreme Court in *United States v. Gypsum Co.*, 333 U. S. 364, 394, where the rule was restated in fashion similar to that which this Court has long recognized.

In *Grace Bros. v. Commissioner of Internal Revenue*, 173 F. 2d 170, 173-174 (C. C. A. 9), this Court reviewed the entire subject, and concluded that:

In giving effect to these norms in a particular case, the burden is upon him who attacks a finding to show that it is clearly wrong [p. 174].⁷

To satisfy this burden appellant offers only the testimony of one witness—himself. The credibility of that testimony was preeminently a matter for the determination of the trial judge who heard the witness.⁸ Moreover, as we shall point out, *infra*, that testimony was contradicted by appellant's other witnesses, and by every relevant circumstance bearing upon the ownership of the property. Appellant calls to the Court's attention the testimony of Ikinaga, Kinney, Tsumoto, and Matsuura in support of his challenge to the findings of the Court below. But consideration of the testimony of those witnesses fails to reveal such support.

Eisuke Ikinaga: Despite his admitted bias in favor of appellant and his willingness "to do anything to help the family" (R. 341-342), he was unable to testify to a gift, but only to a vague and indefinite intention on the part of Kaneichi that "he was going to give" certain Hawaiian properties to appellant (R.

⁷ See also *Fujino v. Clark*, 172 Fed. 384 (C. C. A. 3), cert. den. 337 U. S. 937, where this Court said (at p. 385):

"The findings are supported by substantial evidence, are not clearly erroneous, and hence are accepted by us as correct."

⁸ The trial judge obviously was not impressed with appellant's credibility. He stated: "And even if I were satisfied with the plaintiff's story—which I am not. . . ." (R. 156.)

246). Ikinaga did not at any point testify that a gift had been made. It is also noteworthy that Ikinaga admitted paying dividends on the stock of Waipahu Garage Co., Ltd., to Kaneichi Nii as late as August 1936 (R. 334-335), more than a year after the alleged gift from Kaneichi to appellant of "everything" in Hawaii. Appellant makes no attempt to reconcile this fact with his claim of prior ownership.

Oliver Kinney: The testimony of Kinney, if anything, serves to negate rather than uphold appellant's theory; for he testified that in 1941 he bought property listed in Kaneichi's name through appellant, acting as attorney-in-fact for Kaneichi (R. 303-304). This evidence merely corroborates the trial court's view that in general appellant was acting as his father's agent rather than in his own right.

Henry Jinichi Tsumoto: This witness was able to testify only that appellant collected the rentals from Kaneichi's property after Kaneichi went to Japan (R. 194-195). An obvious and admitted fact, it is of course wholly consistent with appellant's authority, as an agent of his father, to manage his father's property. This testimony seems especially unrevealing when it is recalled that appellant collected the same rents upon the same ostensible authority from January 1933, long before the date when appellant claims he was given the real property.

Shigeo Matsuura: An accountant, beginning in 1935, for a firm which kept records for appellant (R. 262-263), Matsuura had no information to offer with respect to the alleged gift. His testimony was limited to information which appellee does not dis-

pute, that certain taxes on the property and income arising therefrom were paid by appellant (R. 262-291). That circumstance is hardly remarkable since appellant had been paying the real estate and income taxes on the same property since 1933. Nor is it in any way inconsistent with appellant's authority to manage the property for his father. Indeed, Matsuura's further testimony that he could not recall any year when *Kaneichi* Nii was not carried as the taxpayer on the tax bill (R. 291) confirms the trial court's view.

From these four witnesses, on whom appellant relies chiefly, there is no single piece of direct and positive testimony in support of the alleged gift of real property. Indeed, it is difficult to imagine, even inferentially, in what way any of these witnesses supported appellant's claim of gift.

There is, on the other hand, a formidable array of direct and circumstantial evidence indicating that there was no gift. In the first place, the alleged donor, appellant's father, in a deposition obtained at appellant's instance, stated that he still owned properties when he left Hawaii and that, after his arrival in Japan, he gave appellant a power of attorney "to dispose of my properties in Hawaii" (R. 214). This is a striking, unequivocal denial of gift of Kaneichi's Hawaiian properties. It is perhaps understandable, then, that appellant should have sought to impeach his father's testimony both during the trial (R. 239-240) and after its conclusion (R. 128), and that he should devote major attention in his brief to the discrediting of depositions in general (Appellant's

Brief, pp. 24-28). It may be that in some cases testimony by deposition is subject to a different measure of scrutiny than testimony heard in open court; but such a rule can hardly have any force here where the correctness of the matter testified to by deposition is corroborated so substantially.

At the time of the claimed gift of all of Kaneichi's property in Hawaii, he owned at least two parcels of land (one of which is the larger parcel here in dispute) and 311 shares of stock in Waipahu Garage Co., Ltd. Record title to both pieces of land was then in Kaneichi and so remained until one was sold and the other vested. Similarly, the shares of stock were then registered in Kaneichi's name and were not changed to Shoso's name until 1939. If Kaneichi had intended a transfer of ownership of any or all of these properties to appellant, it is clear that he knew how to make the transfer. In 1932, for example, he had transferred his store to appellant by duly recorded bill of sale (R. 51-53). Even more striking is the fact that appellant, several years after the alleged gift, had a power of attorney prepared for his father, to be effective only in the Territory of Hawaii, empowering appellant to deal with Kaneichi's property in Hawaii. That power was signed by Kaneichi on February 7, 1939, and returned to appellant (D. Ex. 6, R. 64-67). Thereupon, appellant immediately used the power to transfer his father's shares of stock to his own name (R. 333). Later he employed it in selling a piece of his father's real property (R. 302-304). In both cases Kaneichi, not appellant, was the transferor of record. In both cases, it appears that Shoso acted

solely as his father's attorney-in-fact. Moreover, although appellant held a power of attorney from his father from 1939, and although he was in Japan from 1941 to 1947, he made no effort to cause the title of the land to be transferred to his own name. The sharp contrast between his handling of the stock, which he carefully transferred to his own name, and his dealing in the land, which he left in his father's name, is strong evidence that not even the appellant considered himself to be the title holder of the property. The facts that appellant collected the money from those sales which he effected on his father's behalf, that he collected the rentals on other real property in his father's name, and that he paid the taxes, do not advance the appellant's claim of ownership a whit. They tend rather to bear out the known fact that the son acted as the father's agent.

There is thus considerable evidence that appellant never pretended to be the owner of the properties in issue until after they were vested. Certainly, if he had been the owner since May 1935, he would have needed no power of attorney to deal with his own property;⁹ nor would he have bought additional land in his father's name as he did in 1938; nor would he have paid the real-estate taxes in his father's name, as he did every year. Appellant's belated and uncorroborated claim that the land was given to him at a dinner in 1935

⁹ If appellant argues alternatively that the power was necessary to formalize the earlier gift conveyances, his use of the power for transfer to himself of the stock and his failure to transfer the real property to himself compels him to take the untenable position that conveyances of realty do not require as great formality as transfers of personalty.

at which his father, mother, and wife were present, even if it were not expressly negated by his father's testimony, could not possibly prevail against his inconsistent actions from 1935 to 1947.

Appellant makes one last argument with respect to the proof offered. Referring repeatedly to his father's will, executed in 1932, in which he is named as sole beneficiary, he contends that the will somehow evidences the gift. Just how, he does not, and indeed cannot, make clear, since the provisions of the will are palpably irrelevant to the issues of this case. Assuming, *arguendo*, that the will is genuine and has not been revoked, no stretch of the imagination would permit acceptance of the will as evidence of an intention to make an *inter vivos* disposition of property which Kaneichi did not even own in 1932. To state such an argument is to refute it.

In sum, then, it appears that there is no satisfactory evidence of a gift and that the Court's findings (R. 145-151), far from being "clearly erroneous," were, in fact, compelled by the evidence.

In an effort to escape the incontrovertible showing that there was no executed gift, appellant suggests that judgment should have been rendered for him on the theory of a promise to give, followed by partial performance and action to his detriment in reliance on the promise. See Appellant's Brief, pp. 33-39. The first difficulty with this theory is that it represents a complete departure from the theory on which the case was tried. The original pleadings were based on the theory of an executed gift; and during the trial appellant's counsel repeatedly reaffirmed his

intention to prove that a gift was in fact made by Kaneichi prior to his departure from Hawaii (R. 228, 233, 243, 364).¹⁰

It is true that, a few minutes before the trial was scheduled to begin, appellant sought to amend his complaint, citing Federal Rule 15 (b) which allows only "such amendment of the pleadings as may be necessary to cause them to conform to the evidence." But appellant's counsel, when asked by the Court whether "the proposed amendment alters in any way the basic cause of action previously set forth" answered: "No, your Honor, it is the same. We contend that it was a gift." (R. 175.) Thereupon, the District Court denied the motion because the amended allegations appeared to the Court to be "pleaded evidence which technically forms no part of the pleadings" (*Ibid.*). It is clear that a complaint may not be amended to plead evidence. Equally, it is clear that if appellant now seeks to change his theory of the suit, he is barred by the language of Rule 15 (b). For a complaint "cannot be amended on appeal, or treated as amended, where this raises issues not within the theory on which the case was tried." 3 *Moore's Federal Practice* (2d Ed.) § 15.11; see also *Id.* at

¹⁰ *E. g.*, counsel for appellant offered to prove to the Court "that the owner of the property at that time made a gift of the property to Shoso Nii" (R. 233). When appellant was on the stand, the following colloquy occurred on direct examination (R. 364):

"A: He promised me, he gave me all the property in the Territory.

"Q: He promised you or he gave?

"A: He gave me.

"The Court: Let me have that answer again . . .

"The Witness: He gave me all the property in the Territory."

§ 15.13; *Champ v. Atkins*, 128 F. 2d 601 (App D. C.); *Anderson v. Mercado*, 163 F. 2d 303 (C. C. A. 1), cert. den. 332 U. S. 837.

But even if appellant could overcome these procedural difficulties, the theory of a promise to give is likewise not supported by the proof. Such a theory must rest either on the alleged conversations in 1935, as to which the trial judge did not believe appellant's unsupported testimony, or on asserted conversations in 1928, before his father owned the properties in question. There was likewise no corroboration of appellant's testimony as to the 1928 conversations in this respect, and the trial court rejected it. Finally, the theory is plainly contradicted by other evidence. Between 1935 and 1947 appellant never called upon his father to carry out the alleged promise, but gave every indication that he acknowledged his father's continuing ownership of the property, as we have previously demonstrated at pp. 13-15. Appellant's discontinuance of school and his work in his father's store, even apart from considerations of filial obedience, is more logically attributable to the hope that some day the very thing would happen which did—that his father would give him the store. Hence, it affords no support for theory of a promise in 1928 to give real property not acquired till 1932.

II. Even if a parol gift of the real property to appellant had been contemplated, it would be unenforceable

A. The alleged parol gift does not come within any of the exceptions to the Statute of Frauds

We have shown above the reasons which make us believe that the District Court was correct in holding

that Kaneichi did not make a parol gift of his Hawaiian properties in May 1935. But even if it be assumed that Kaneichi had intended to make a parol gift of the real estate to appellant at that time, still the putative donee would not have been able to enforce that claim against Kaneichi before vesting, nor can he do so now against the Custodian. The Hawaiian Statute of Frauds reads in pertinent part as follows (Revised Laws of Hawaii (1945) § 8721):

No action shall be brought and maintained in any of the following cases:

* * * * *

4. Upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them;

* * * * *

Unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and be signed by the party to be charged therewith, or by some person thereunto by him in writing lawfully authorized.¹¹

It is clear that in Hawaii a parol gift of land is within the Statute of Frauds and is therefore unenforceable for lack of a writing. *Mokuai v. Kapuniai*, 6 Haw. 160. To meet this statutory bar appellant seeks to bring his claim within an exception to the

¹¹ Appellant points out that appellee did not specially plead the Statute of Frauds in his answer "as is required by Rule 8 (c) of the Federal Rules of Civil Procedure" (Appellant's Brief, p. 30). However, it has been held under Rule 8 (c) that where such a defect in a conveyance of real property appears on the face of the pleading, the question may be raised on motion to dismiss, as was done here (R. 24). *Kahn v. Cecilia*, 40 F. Supp. 878 (S. D. N. Y.).

Statute. He alleges that his father's will is a sufficient memorandum to satisfy the Statute, and that he is in possession of the premises and has made improvements thereon (R. 487, 491). But it seems clear that none of these would be sufficient to remove this case from the operation of the Statute. In fact, appellant himself does not urge in his brief (although he did below) that a will which makes no reference to a donative agreement, which is dated prior to the date of acquisition of the property allegedly given, and which is ineffective because the maker is still alive, constitutes a sufficient memorandum to satisfy the Statute of Frauds. But he does still urge that he had possession of the property and that he made valuable improvements thereon, "relying on" his father's representations (R. 491). But his possession cannot be regarded as tending to establish a gift, or as in part performance of a promise to give, for it is at least equally consistent with the theory accepted by the court below, that he was managing agent with respect to the property owned by the father. (See Point III, *infra*.) Moreover, it does not appear that improvements were made out of appellant's own funds. Appellant apparently used the rental money which he received from the properties themselves in order to make the improvements, so it can hardly be said that he expended money of his own in reliance on his father's alleged promise.¹²

¹² Appellant testified that he paid for the improvements "through the store" (R. 318). However, the great bulk of appellant's income for the years 1938-1946, as shown on his income tax returns (Pl. Ex. D-1-D-10, R. 413-441), was derived from

**B. The Custodian is entitled to rely on record title to defeat an unrecorded
parol gift**

Even if, contrary to appellee's contentions thus far, there was a parol gift of land not in violation of the Statute of Frauds, appellant is still confronted with the fact that record title remained in his father until the time of vesting. As the District Court held (R. 157):

. . . the Custodian was entitled to rely upon the record title in the same manner and to the same extent as a bona fide purchaser would have been.

See also *Fujino v. Clark*, 71 F. Supp. 1 (D. Haw.), aff'd on other grounds, 172 F. 2d 384 (C. C. A. 9), cert. den. 337 U. S. 939. Appellant argues at some length (Appellant's Brief, pp. 17-20) that the Custodian may not avail himself of the Recording Statute.¹³ While we feel that this point need never be

rentals, not from the store, and he treated all the income alike. So it makes little difference whether the money for improvements is described as being out of "store" money or out of "rental" money. As a matter of fact, it would be strangely illogical if appellant should have paid the cost of improvements for unfailingly profitable rental properties out of the income from a store which consistently earned substantially less than the rental properties, and which sometimes showed loss. And, finally, the record does not even show that the improvements were made after Kaneichi went to Japan.

¹³ The Hawaiian Recording Statute reads in part as follows (Revised Laws of Hawaii (1945) § 12756):

All deeds . . . or other conveyances of real estate within the Territory, shall be recorded in the bureau of conveyances. Every such conveyance not so recorded shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, not having actual notice of the conveyance, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded.

reached, we believe that the holding of the District Court is correct.

When the Custodian, acting within his admitted powers (Sections 5 (b) and 7 (c) of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. §§ 5 (b), 7 (c)), vests all "right, title and interest" in particular property, or vests the property itself,¹⁴ he certainly obtains as favorable a position as does a quitclaim grantee who likewise succeeds to the exact "right, title and interest" held by his predecessor. Cf. *Commercial Trust Co. v. Miller*, 262 U. S. 51, 56. And it has been generally held that a quitclaim grantee may claim the protection afforded to bona fide purchasers by recording statutes like that of Hawaii. *Brown v. Banner Coal & Oil Co.*, 97 Ill. 214; *Livingstone v. Murphy*, 187 Mass. 315, 72 N. E. 1012; *Aitken v. Lane*, 108 Mont. 368; *Wilhelm v. Aiken*, 149 N. Y. 447, 44 N. E. 82; *Dietsch v. Long*, 72 Ohio App. 349, 43 N. E. 2d 906.

The Custodian does not take in privity to the former owner; he takes rather "in the interest and for the benefit of" the United States. It is true that he does not pay consideration for the property. He is forbidden by the Trading With the Enemy Act from returning property to a national of Japan or making any compensation therefor (50 U. S. C. App. § 39). But the fact that he is forbidden to pay consideration is no basis for denying him the protection of the recording statute of which he could otherwise avail himself. Indeed, in other connections it has been held

¹⁴ In this case the entire res was vested.

that his position is, if anything, better than that of the "ordinary assignee for value." *Standard Oil Co. v. Clark*, 163 F. 2d 917, 932 (C. C. A. 2), cert. den. 333 U. S. 873.

Appellant's final objection to the Custodian's receiving protection under the recording act is that the Custodian took with *constructive* notice of appellant's possession. It is elementary that the statute requires actual notice. As previously observed (pp. 13-15, *supra*), appellant did not hold himself out as actual owner of the property at any time prior to vesting.

III. Appellant did not acquire title by adverse possession

Never at a loss for legal theories on which to support his assertion of ownership, appellant makes still another claim, namely, that "this Court should make [a] finding of adverse possession" (Appellant's Brief, pp. 20-22).¹⁵ The findings which destroy the basis for appellant's claim of a gift are, however, equally fatal to any claim of adverse possession. Hawaii follows the general rule that the possession of the adverse claimant must be "actual, visible, notorious, distinct and hostile." *Manumanu v. Rickard*, 4 Haw. 207, 208; *Akowi v. Lupon*, 4 Haw. 259; *Smith v. Hamakua Mill Co.*, 15 Haw. 648; *Oahu Railroad &*

¹⁵ Although appellant does not specify, we assume that he limits this assertion to the larger parcel of land, for the smaller one was not even purchased until 1938, less than ten years before vesting, whereas the Hawaiian statute requires ten years' adverse possession. Section 10439, Revised Laws of Hawaii (1945) reads:

"No person shall commence an action to recover possession of any lands, or make any entry thereon, unless within ten years after the right to bring such action first accrued."

Land Co. v. Kaili, 22 Haw. 673. Manifestly, if the entry is by permission of the owner, the possession cannot be adverse. Cf. *Albertina v. Kapiolani Estate*, 14 Haw. 321, 325. Equally, if the alleged adverse possessor, during the period of claimed adverse possession, should in any way recognize the title of the true owner, the possession is not adverse, but in subordination to the title of the true owner. *Oahu Railway & Land Co. v. Kaili*, *supra*. In this case, appellant fails on both scores. He first began to manage the property in 1933, at which time he was admittedly the agent of his father. There is no showing that there was any change in his capacity at any time thereafter. There is no affirmative testimony by appellant's father, mother, wife, or by any of the tenants who occupied the property, that appellant was the owner or that he ever held himself out as such until after the property was vested. By his continued payment of taxes on the real property in his father's name, his procurement and use of a power of attorney from his father, his failure to take any steps to perfect his claim of title during the period from 1935-1947, or even to inform his father of that claim,¹⁶ appellant recognized in the clearest possible manner his father's continuing ownership and his own permissive relationship thereto. In brief, the very facts that compelled the court below to conclude that appellant was an agent rather

¹⁶ We pass over the question whether appellant could be an "actual, visible, notorious, distinct, and hostile" possessor of the Hawaiian property during the six years (1941-1947) that he was living in Japan, at his father's home, several thousand miles away.

than a donee likewise compel the conclusion that appellant's possession was not adverse to his father.¹⁷

IV. The District Court had jurisdiction, under section 17 of the Trading With the Enemy Act, to allow the custodian's counterclaim

As a final objection to the action of the District Court in this matter, appellant argues that that Court exceeded its jurisdiction in issuing its "Order Directing Accounting and Payment Under Section 17, Title 50, U. S. C. A., As Amended"; and that that Order conflicts with its "Judgment Order" entered at the same time. Appellant's Brief, pp. 10-11, 34-35. Section 17 reads in pertinent part:

That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act * * *.

That section confers broad power on the courts to enter any orders which may be necessary to establish the Custodian's rights in respect of any property or interest which he has vested. See *Markham v. Allen*, 326 U. S. 490, 495; *Silesian-American Corporation v. Clark*, 332 U. S. 469; cf. *United States v. Silliman*, 65 F. Supp. 665, 671 (D. N. J.), reversed on other

¹⁷ *MacFarlane v. Damon*, 10 Haw. 495, on which appellant relies to establish his claim of adverse possession is patently inappropriate because of a differing fact situation. In that case the possession was truly adverse and hostile from inception and involved no subsequent recognition of the title of the donor.

grounds, 167 F. 2d 607 (C. C. A. 3), cert. den. 335 U. S. 825. Moreover, it is settled that in a suit under Section 9 (a) of the Trading With the Enemy Act, the court sits as a court of equity and has broad jurisdiction, by way of counterclaim or otherwise, to do complete justice between the parties. *Cummings v. Societe Suisse Pour Valeurs de Metaux*, 85 F. 2d 287 (App. D. C.); *Swiss National Insurance Co. v. Crowley*, 136 F. 2d 265 (App. D. C.), cert. den. 320 U. S. 763; *Isenberg v. Biddle*, 125 F. 2d 741 (App. D. C.); *Standard Oil Corporation v. Clark*, 163 F. 2d 917, 934 (C. C. A. 2), cert. den. 333 U. S. 873.

Here the Custodian specifically vested the claim of Kaneichi to rents collected from the vested property (R. 14). And we think there can be no dispute that if the Court's holding that the property was owned by the father is sustained, as we submit it must be, the Custodian is also entitled to any rentals collected by appellant for his father. Indeed, appellant apparently does not dispute that he is obligated to pay the rentals in question, but confines himself to the assertion that the Court did not have jurisdiction at this time and in this proceeding to enter an order directing payment of the rentals. His assertion appears to be based on the theory that, because the Court refused to grant relief on the counterclaim in advance of the trial on the main action, it lost jurisdiction to grant relief on the counterclaim at the time of decision on the main action. Neither reason nor authority for this assertion is stated by appellant, and we can conceive of none. Judge McLaughlin said

in his oral decision on the petition for an order on the counterclaim (R. 109) :

I think the ends of justice can be as well served by the turnover directive being settled at the end of the litigation.

We believe it undeniable that with those words the Court preserved in itself the jurisdiction which is conferred upon it by Section 17 of the Trading With the Enemy Act to enforce the Custodian's vesting orders.

There is no conflict between the two orders. The order of which appellant complains merely makes specific the general language of the Judgment Order. The latter provides in this connection as follows (R. 159) :

5. Shoso Nii shall, on or before February 23, 1949, account for and pay over to the Attorney General of the United States, as Successor to the Alien Property Custodian, all of the net income from the real property vested under Vesting Order No. 9777, for the period May 1, 1935, to and including October 1, 1947.

The Order Directing Accounting and Payment (R. 160-161) divides the above direction into two parts. Paragraph 2 requires appellant to account for the net income from the vested real property for the period from May 1, 1935 to July 1, 1941 (R. 161). That was the period during which appellant managed the properties before leaving for Japan, and no figures are available to appellee, thus necessitating an accounting. Paragraph 1 requires the payment of \$3,169.01 (R. 160-161), as specified in the Turnover Directive

(R. 101-103). This figure, the correctness of which was not challenged at the trial, covers the balance of the period, i. e., July 1, 1941 to October 1, 1947, for which more precise records were available through Katsutoshi Mikami, appellant's attorney-in-fact (R. 271-272). We see nothing inconsistent between these requirements and that of the Judgment Order which they serve to clarify.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted.

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San Francisco, California,
October, 1949.

No. 12,212

IN THE

United States Court of Appeals
For the Ninth Circuit

SHOSO NII,

Appellant,

vs.

TOM C. CLARK, Attorney General as
Successor to the Alien Property
Custodian,

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

CLOSING BRIEF OF APPELLANT.

FILED

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No. 12,212

IN THE

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SHOSO NII,

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Custodian,

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

CLOSING BRIEF OF APPELLANT.

I.

**APPELLEE DOES NOT SATISFACTORILY ANSWER ARGUMENT I
OF APPELLANT'S OPENING BRIEF.**

It was submitted in appellant's opening brief that the Alien Property Custodian does not stand in a same position as a bona fide purchaser under the Hawaiian recording statutes. (Op. Br. pp. 17-20.)

The appellee states in his brief "while we feel that this point need never be reached, we believe that the holding of the District Court is correct" (R. Br. pp.

21-22) appellee does not cite a single case except *Fujino v. Clark*, 71 F. Supp. 1 (D. Haw. by same Judge J. Frank McLaughlin) affirmed on other grounds 172 F. (2d) 384 (C.C.A. 9). The other cases cited are clearly not in point.

The statute under which appellant brought suit is clear on the subject. Section 9 (a) of the Trading with the Enemy Act, 40 Stat. 411, as amended (50 U.S.C. App. (9a)) provides as follows:

“Any person not an enemy or ally of enemy claiming *any* interest, right, or title in any money or other property which may have been * * * seized by him hereunder and held by him * * * may file with the said custodian a notice of his claim * * * That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish *any* right, title, or interest which he may have in such money or other property. * * * said claimant may institute a suit in equity in the Supreme Court of the District of Columbia (District Court of the United States for the District of Columbia) or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treas-

urer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act (chapter) * * *”

It is significant that the statute provides that “*any* right, title or interest” may be established by persons in position similar to the appellant. It further provides that during the suit the property shall be kept in custody.

Had the properties in issue been sold, would the Alien Property Custodian deny that appellant would have the right to claim for the proceeds if he could establish by competent proof that the properties sold equitably belonged to the appellant and therefore the proceeds should be paid to the appellant?

Appellee must not confuse this case from that where the property is once sold and the claimant sues the bona fide purchaser at such a sale. The recording statute will protect the bona fide purchaser at such a sale. But the present case is not such a case. Section 9 (a) above quoted expressly provides the appellant with a remedy.

II.

APPELLEE DOES NOT SATISFACTORILY ANSWER ARGUMENT
II OF APPELLANT'S OPENING BRIEF.

The claim of the appellant with relation to the larger parcel by way of adverse possession was not novel. The claim was expressly made in appellant's complaint. (Tr. p. 6.)

The Court did not make any findings with respect to this theory of the appellant's case. Therefore, the erroneous findings of the trial Court with relation to the gift are relied upon by the appellee.

Findings required under an adverse possession theory and that of parol gift of realty differ greatly. One may not be substituted for the other.

It was obligatory on the part of the trial Court to make fact findings with relation to the claim of adverse possession. And as pointed out in the opening brief, in the absence of such findings this Court may make the required findings.

During the appellant's six years' absence in Japan the appellant's agent was in possession. (Tr. p. 149.) The Court expressly found that Katsutoshi Mikami was appellant's attorney-in-fact. Katsutoshi Mikami's possession could not be that of the appellant's father because the Court expressly found that Mikami was appellant's attorney-in-fact only. This is in answer to footnote 16 at the bottom of page 24 of appellee's brief.

III.

APPELLEE DOES NOT SUFFICIENTLY MEET APPELLANT'S
CONTENTIONS IN ARGUMENT III RELATING TO PAROL
GIFT OF REAL ESTATE.

The testimony of Eisuke Ikinaga is quoted in a misleading manner by the appellee. (R. Br. p. 11.) The testimony is as follows:

“Q. Now, prior to May, 1935, when Mr. Kaneichi Nii (86) departed for the Empire of Japan, did you have any conversation with him as to what he did with his properties in Hawaii?

Mr. Gross. Objected to as being leading. I will withdraw the objection.

The Court. All right.

A. Yes, I had.

Q. And what was that?

Mr. Gross. If the Court please, now I am going to object to it unless Counsel will fix the time and place and date and who were present so that it will be possible to——

The Court. If anyone were present.

Mr. Gross. That's right, if anyone were present.

Q. (by Mr. Kashiwa). Was there anyone present at the time of that conversation?

A. I do not remember.

Q. Where was this conversation had?

A. After he had definitely decided to return to Japan, he came to me at my garage.

Q. Where was that garage?

A. Waipahu Garage.

Q. With relation to the time Mr. Nii went back to Japan, about how many days or months prior to that was it?

A. I do not recollect exactly but the conversation took place after he had definitely decided to return, and that the (87) baggage and personal belongings were being crated up, which was presumably about three or four days prior to the sailing.

Q. Now, what was the conversation?

A. He told me that he had definitely decided to return to Japan and that all the properties he had in Hawaii he was going to give to Mr. Shoso, his son, and told me that inasmuch as Shoso was a young man for me to look after them as though I were in his place." (Tr. pp. 245-246.)

Eisuke Ikinaga did not testify that he would do anything for the appellant's family. (R. Br. p. 11.) He testified as follows:

"Q. (by Mr. Gross). Then Mr. Kaneichi Nii was an old friend of yours, was he not?

A. Yes, from that time on I associating with him very intimately as own brother.

Q. And you would have done anything that he asked you to do, would you not?

A. Anything that I can do, I'd be glad to do for him.

Q. And you would do anything you could to help his family, would you not?

A. From my first acquaintance with him I associated just like a brother, so I would be willing to do anything to help the family.

Q. And you would still do anything to help Mr. Shoso Nii, would you not?

A. Time is a little different. Time has changed. And I am not at all—I mean the age is different. I was associated with his father so intimately, but

the time has changed and Shoso Nii, due to the difference in age of Shoso Nii and (195) myself, I may not—I may ask you to repeat. It is rather confusing.

Q. Yes?

A. Since I was a very good friend of Nii, and as I have been constantly asked about Nii from Japan to help Shoso Nii, I'd be very happy if I can help Shoso Nii, because I was an old friend of the family."

It must be remembered that Kaneichi Nii is not the appellant.

The appellee states:

"From these four witnesses, on whom appellant relies chiefly, there is no single piece of direct and positive testimony in support of the alleged gift of real property. Indeed, it is difficult to imagine, even inferentially, in what way any of these witnesses supported appellant's claim of gift." (R. Br. p. 13.)

Could any testimony be clearer? How much clearer must one's testimony be before such a serious charge may be made with relation to Eisuke Ikinaga's testimony? The trial Court evidently forgot Mr. Ikinaga's testimony.

Appellee contends that the appellant collected the rents as an agent. An agent accounts to his principal but all of the evidence shows that appellant kept all funds. Appellant paid income taxes not as an agent of Kaneichi Nii but in his own name. These important facts are unimportant to the appellee.

The rental income shown in the tax returns covered income from properties other than the properties in dispute. A careful reading of the transcript pages 275-277 will clarify this.

Appellee's reliance on speculative circumstantial evidence is unwarranted.

IV.

APPELLEE DOES NOT DISPUTE APPELLANT'S RIGHT TO AMEND COMPLAINT.

The appellee apparently admits that under Rule 15 (b) quoted on page 33 of appellant's opening brief that the amendment by way of the amended complaint should have been permitted. Appellee does not in his brief deny the exercise of the said right under said rule.

It is submitted that this amounts to an admission of error on the part of the appellee.

V.

APPELLEE HAS FAILED TO MEET APPELLANT'S CONTENTIONS IN ARGUMENT V OF OPENING BRIEF.

If it turns out that upon final accounting that the amount owing is less than \$3169.01, must the appellant still pay the \$3169.01?

If he overpays, must appellant again bring a Section 9 (a) suit to recover the overpayment? If not,

what would be appellant's remedy for the overpayment?

Appellee has not answered these questions.

VI.

NO FACT FINDING AS TO SMALLER PARCEL AND TRIAL COURT ERRED IN APPLYING BONA FIDE PURCHASER RULE TO SAID PARCEL.

As for the smaller parcel which was purchased by the appellant the trial Court made no fact findings whatsoever but relied on the rule of bona fide purchaser. The Court stated in its Opinion:

“And even if I were satisfied with the plaintiff's story—which I am not—as to the larger parcel of real estate and *also as to the smaller one serving as a right of way to the larger tract which the plaintiff bought but oddly took title thereto in his father's name—as to both—a further reason for concluding that the plaintiff cannot here recover is that the Custodian was entitled to rely upon the record title in the same manner and to the same extent as a bona fide purchaser would have been.* Any equities which the plaintiff might have had were thus cut off when the property was vested as the father's, and as the records of the Territorial Bureau of Conveyances showed it to be.” (Emphasis supplied.)

As submitted in Argument I of appellant's opening brief at page 17, the rule of bona fide purchaser is not applicable in this case. Such being the case the

trial Court must be reversed with relation to the smaller parcel.

CONCLUSION.

It is therefore submitted that the trial Court erred in all particulars as argued in the appellant's opening brief.

Dated, Honolulu, Hawaii,
October 28, 1949.

Respectfully submitted,

SHIRO KASHIWA,

Attorney for Shoso Nii, Appellant.

No. 12212

In the United States Court of Appeals
for the Ninth Circuit

SHOSO NII, APPELLANT

v.

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUC-
CESSOR TO THE ALIEN PROPERTY CUSTODIAN,
APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE TERRITORY OF HAWAII

APPELLEE'S PETITION FOR REHEARING

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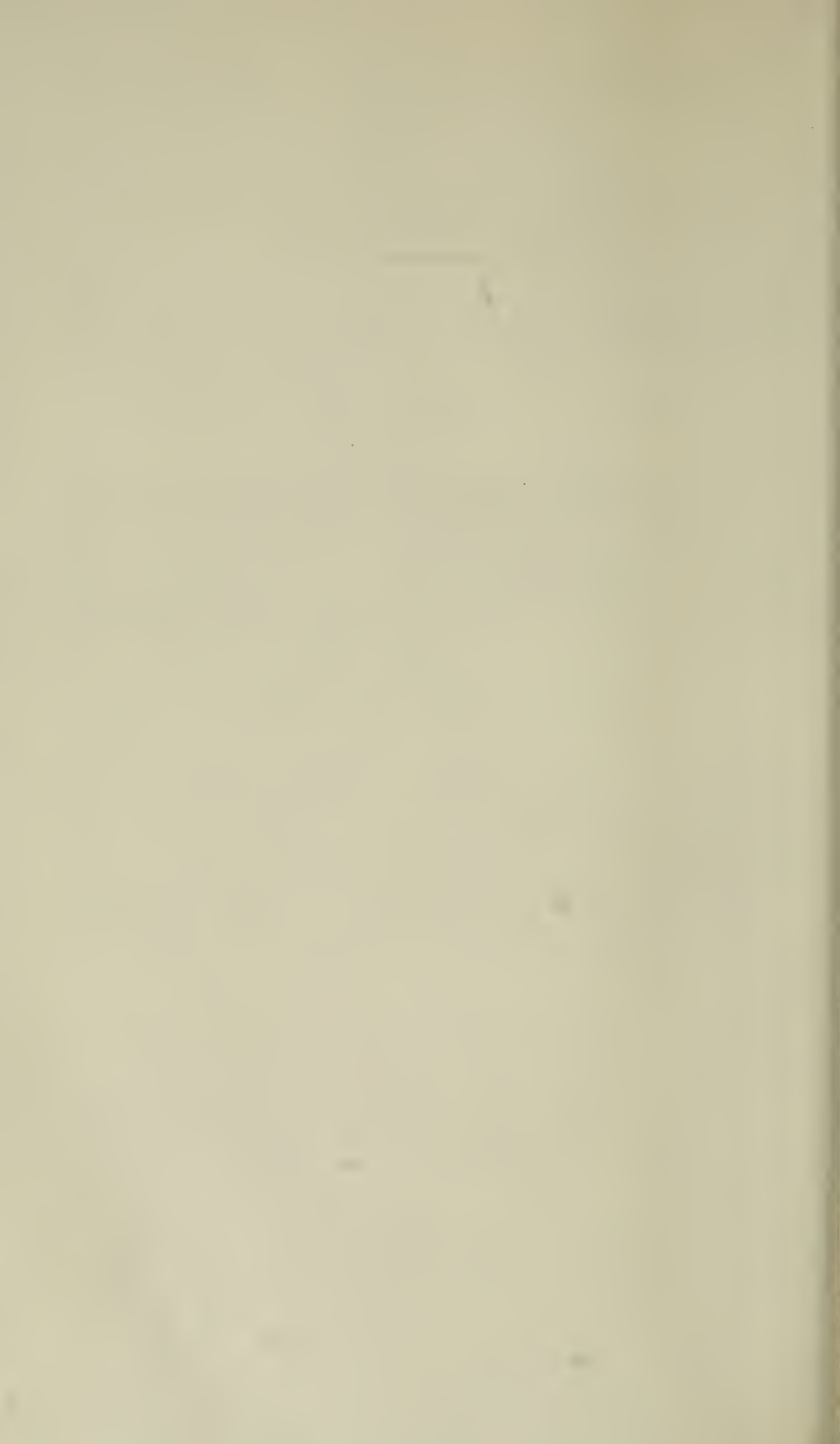
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In the United States Court of Appeals for the Ninth Circuit

No. 12212

SHOSO NII, APPELLANT

v.

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUC-
CESSOR TO THE ALIEN PROPERTY CUSTODIAN,
APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE TERRITORY OF HAWAII*

APPELLEE'S PETITION FOR REHEARING

STATEMENT

On March 6, 1950, this Court reversed that portion of the judgment of the United States District Court for the District of Hawaii which held that Shoso Nii, appellant in this Court, had "no interest, right, or title in the real property within the meaning of Section 9 of the Trading With the Enemy Act" (R. 159).

This Court held that appellant was, at the time of vesting, the equitable owner of the real property in question. In reaching that result the Court found as a fact that appellant's father, the owner of record title at the time of vesting, had promised in 1928 to give appellant "all his property in Hawaii when

the father died or when he permanently left Hawaii, in consideration of the son, already admitted to high school in 1928, giving up his education to work in his father's store" (Opinion, p. 2). Full performance of the conditions was also found as a matter of fact. Despite the fact that the case was decided in the trial court on a different theory, this Court held that the evidence before the trial court was sufficient to support the findings made by this Court. Thereupon, citing Rule 15 (b) of the Federal Rules of Civil Procedure, this Court reversed the judgment below without remanding the case to the trial court for further proceedings.

Pending further briefing, this Court held in abeyance its decision on the question of the right to income from the property earned subsequent to appellant's abandonment of his high school education and his service in his father's store and prior to his father's death. Appellee's supplemental brief on this question is being submitted separately in typewritten form, as requested by the Court.

QUESTIONS PRESENTED

1. Whether the theory upon which this Court reversed the judgment of the court below was at issue before the trial court.

2. Assuming a negative answer to the first question, whether appellee has been prejudiced by not having an opportunity to cross-examine, present affirmative evidence, and argue the legal theory on which this Court based its decision.

ARGUMENT

1. This Court reversed the judgment of the District Court for its alleged improper failure to allow an amendment of appellant's complaint, the stated ground of this Court being that evidence in support of the theory of the amended complaint was admitted without objection by appellee. As authority the Court cited Rule 15 (b) of the Federal Rules of Civil Procedure, which reads as follows:

Rule 15 (b). Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Appellee has no quarrel with the Court's statement of the controlling law. But we submit that its application to this case has been seriously misconceived.

We have no doubt that an important purpose of Rule 15 (b) is to permit the consideration of issues which have been tried with the express or implied consent of the parties as if they had been raised in the pleadings. *Lientz v. Wheeler*, 113 F. 2d 767 (C. A. 8); *Hover v. Genesee Valley Trust Co.*, 123 F. 2d 813 (C. A. 2); 3 *Moore's Federal Practice* (2d Ed.), § 15.13. Even prior to the adoption of Rule 15 (b) this Court had long recognized the general applicability of the principle that where evidence received without objection supports the verdict, defective pleadings will be presumed by an appellate court to have been amended to conform to the proof. *A. Coolot Co. v. L. Kahner & Co.*, 140 Fed. 836 (C. A. 9); *Drilling & Exploration Corp. v. Webster*, 69 F. 2d 416 (C. A. 9); *Hertz Drivurselb Stations v. Ritter*, 91 F. 2d 539 (C. A. 9).

But even as this Court has long recognized the general rule in this connection, it has also enunciated clearly the limitations upon that doctrine. In *Hertz Drivurselb Stations v. Ritter*, *supra*, at page 544, this Court deemed "the complaint amended to conform to the evidence and to the trial court's finding" because "there is nothing to indicate that the appellant was in anywise misled by the defects in appellee's complaint or that on a new trial the evidence would be any different." Thus, the test is seen to be that a complaint may not be treated as amended if it introduces an extrinsic issue or changes the theory on which the case was actually tried to the prejudice of one of the parties. This test has even been applied by this Court to preclude affirmance where the fact

findings of the trial court might have supported a judgment on a theory not pleaded in the lower court. *Sears, Roebuck & Co. v. Marhenke*, 121 F. 2d 598 (C. A. 9). In that case all parties in the trial court, as well as the court itself, treated the action as one based on a theory of negligence. This Court reversed the judgment for plaintiff, refused to consider whether the evidence adduced at the trial would support the judgment below on a theory of implied warranty, and so remanded the case to the trial court for amendment of the complaint and the taking of additional evidence if necessary. The Court held (121 F. 2d, at p. 601):

This is not a case in which issues not raised by the pleadings were tried by the "express or implied consent of the parties" and Rule 15 (b) * * * has therefore no application. The case was tried as one for negligence in accordance with the issues made by the pleadings.

Whether the evidence offered would have supported a judgment for breach of an implied warranty based upon other pleadings and findings we need not now determine. The present action must be treated as one for negligence only.

Other Courts of Appeals have applied similar restrictions to the general principle underlying Rule 15 (b). In *Simms v. Andrews*, 118 F. 2d 803, 807 (C. A. 10) the Court held that Rule 15 (b)

* * * does not authorize such an amendment merely because evidence which is competent and material upon the issues created by

the pleadings incidentally tends to prove another fact not within the issues in the case.

And in *United States v. City of Brookhaven*, 134 F. 2d 442, 446 (C. A. 5) the Court stated that Rule 15 (b)

* * * looks to supporting the judgment by the amendment, or to making the record show more perfectly what was really tried and decided. It does not authorize an amendment to nullify the judgment and begin a new contest.

See also *Champ v. Atkins*, 128 F. 2d 601 (C. A. D. C.); 3 *Moore's Federal Practice* (2d Ed.), § 15.13.

From the foregoing it is clear that the crucial issue in each case is whether decision of a case at the appellate level on a theory of action not presented to the trial court by way of pleadings or evidence, and as to which no findings were made, would prejudice the party who had had no opportunity to respond to that issue.

The above-enunciated rule is only one of many manifestations of the now-familiar judicial maxim that "rules of practice and procedure are devised to promote the ends of justice, not to defeat them." Mr. Justice Black, in *Hormel v. Helvering*, 312 U. S. 552, 557. The broad principles of the scope of appellate review were laid down in the same case (p. 556):

Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they

believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Compare also *United States v. Rio Grande Irrigation Co.*, 184 U. S. 416; *Fountain v. Filson*, 336 U. S. 681. The principle which is common to all these cases and situations is that an appellate court may not reverse summarily the judgment of a trial court where the result would be that:

the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case. [*Fountain v. Filson*, *supra*, at page 683.]

2. The standards of fairness outlined above are particularly pertinent to this case. The pleadings were drawn, the evidence was presented, and the court's findings were made on appellant's theory of a completed gift in 1935. In the trial court any reliance upon the theory of a promise to give and subsequent right to specific performance was explicitly and repeatedly denied by appellant.

There is, of course, no doubt that the original complaint on which the case was tried was insufficient to support this Court's theory of the father's promise to give the property at his death upon consideration of appellant's leaving school and working in his father's store. That complaint merely alleged, in this connection (R. 4):

* * * that in May of 1935 said Kaneichi Nii decided to retire from active business and returned to Japan; that at the time he returned to Japan he left and gave by way of gift everything he left in the Territory of Hawaii to his only son, the plaintiff herein.

Accordingly, appellant must find support for a change in the cause of action either in the proposed amended complaint or in the evidence adduced at the trial. We submit that neither is possible. The proposed amended complaint included additions to the original complaint relevant to this point, as follows (R. 115-116, 119):

* * * that in consideration of plaintiff's giving up his studies said Kaneichi Nii agreed, covenanted and promised that said Kaneichi Nii will give and transfer all of the properties, both real and personal, he owned in the Territory of Hawaii to the plaintiff in case said Kaneichi Nii left for Japan or in case said Kaneichi Nii died all of said Kaneichi Nii's properties will be the plaintiff's; that plaintiff relying on said Kaneichi Nii's aforementioned promise, covenant and agreement did not continue on to high school but discontinued, quit and dropped his schooling completely and in July 1928, began helping said Kaneichi Nii at the said "K. Nii Store." * * *

* * * * *

* * * that at the time of Kaneichi Nii's leaving he left by way of gift everything he had whether by way of personal property or real property in the Territory of Hawaii to

the plaintiff; that the foregoing gift was in full execution of the agreement, promise and covenant made by said Kaneichi Nii to the plaintiff in the year 1928 as aforedescribed. * * *

The above quoted language does not support this Court's theory that the property was promised to appellant upon the father's death *subsequent* to departure from Hawaii. The most that could be urged from that wording is that the father promised to give appellant his property upon his death or departure from Hawaii, whichever came earlier. But at the trial appellant denied, as we shall point out *infra*, any reliance on that theory also; and the evidence presented did not support such a theory.

That appellant himself never urged a gift to be effective only at his father's death is shown by the assertion in the proposed amended complaint that the gift was consummated in 1935, alleging (R. 119):

* * * that at the time of Kaneichi Nii's leaving he left by way of gift everything he had * * * in the Territory of Hawaii to the plaintiff. * * *

This, of course, is very different from a gift of property not intended to be effective until the still incalculable date of Kaneichi Nii's death, as this Court held was the case. Moreover, appellant was clearly proceeding on the theory of a gift executed in 1935, and pleaded the 1928 promise only in support

of that theory; there is nothing even in the amended complaint to suggest this Court's theory of a right to specific performance of an unperformed promise to give at an indeterminate future date.

When counsel for appellant offered the proposed amended complaint at the beginning of the trial, he stated in words that could not possibly be misunderstood that he contemplated no change in the cause of action from the original complaint, that he claimed an executed gift, and that he did not intend to rely on a promise of gift. The amendment was originally served on appellee and moved in the trial court immediately prior to the beginning of the trial. Both Judge McLaughlin and Mr. Gross, counsel for appellee, were understandably concerned to know whether this belated amendment raised any new issue as to which appellee had not been fairly apprised in his preparation for trial. In response to queries by the court, Mr. Kashiwa, counsel for appellant, replied (R. 170):

As far as the cause of action, it is not changed at all, your Honor.

A few minutes later Judge McLaughlin asked pointedly and was answered as follows (R. 175):

The COURT. Do you contend that this proposed amendment alters in any way the basic cause of action previously set forth?

Mr. KASHIWA. No, your Honor, it is the same. We contend that it was a gift.

With that assurance Judge McLaughlin properly denied the motion to amend as amounting merely

to pleading evidence (R. 175-176).¹ Accordingly, the trial was allowed to proceed forthwith despite the clear implication that if the trial judge had believed that appellant was raising a new issue, he would have entertained a motion for continuance to allow appellee further time to prepare to meet any new and different theory.

The trial likewise was conducted on the theory of an executed gift effective in May 1935. Indeed, appellant himself in his extensive testimony did not once urge that the property was to be his only upon his father's death. Rather he contended at all times, in answer to questions by the court and by counsel, that his father gave him the property in 1935. For example, when Mr. Kashiwa questioned appellant on this precise subject, the following colloquy occurred (R. 364):

Q. He promised you or he gave?

A. He gave me.

The COURT. Let me have that answer again.

* * * What's the answer?

The WITNESS. He gave me all the property in the Territory.

Questioning by Mr. Gross, counsel for appellee, received a similar response (R. 365):

Q. Mr. Shoso Nii, as of what date do you claim that your father gave you the real estate which is the subject matter of this lawsuit?

¹ A motion to amend was again denied at the conclusion of the trial, Judge McLaughlin saying, "I can't see anything in your amended complaint which * * * changes the theory of your case one iota," and that he denied the amendment "on the theory that you are neither harmed nor prejudiced by the denial" (R. 397).

A. I can't remember exactly the date, but it was in 1935, just the date before he left for Japan.

It is plain, then, that the pleadings, the oral assurance of appellant's counsel as to the meaning thereof, and the evidence presented at the trial all pointed to the same conclusion, *viz.*, that appellant contended that his father had given him the property in 1935. On that theory it is apparent that appellant's additional testimony in regard to his father's promise in 1928 that he *would* give the property to appellant in the future was introduced merely to indicate in a general way the father's generous inclination toward appellant. From the evidence adduced at the trial it is reasonable to conclude, even assuming *arguendo* a promise made in 1928, that such promise was more than satisfied by the various gifts to appellant made prior to 1935, including a car, the Kaneichi Nii Store, a bank account, shares of stock, etc. There was no attempt at the trial to establish that the alleged promise of 1928 was intended to cover property which was not acquired until some years later. Accordingly, we submit that evidence originally introduced solely for the purpose of demonstrating the father's generous impulses to appellant should not be distorted to serve a different purpose, a purpose which appellant's counsel disclaimed, and which appellant's testimony at the trial clearly showed not to be in accord with his then theory of the facts.

A peculiarly apt illustration of the fact that this issue was not in any way before the trial court is

found in this Court's request for further briefing on the question of income between 1935 and the father's death. Neither party briefed that question below or in this Court because both believed that the question of rights to income depended altogether on the outcome of appellant's plea for relief, as stated in both the original and amended complaints (R. 12, 125-126):

* * * that it be adjudged that the right and title in said real properties are in the plaintiff and that said plaintiff is entitled to the *immediate possession* thereof. * * *
[Emphasis supplied.]

Thus, if appellant had been sustained in that claim of right to immediate possession on the basis of a gift in 1935, then appellant would have been entitled to retain the rental income. But, when appellant's right to possession and equitable title was denied, the trial court necessarily gave judgment for the appellee as to the rental income. For the same reason, of course, the trial court did not find it necessary to make the findings in regard to income which this Court's different theory necessitates.

From the foregoing we think there can be no doubt that appellee's defense at the trial was predicated upon the reasonable understanding that appellant based his entire case upon a claim of an executed gift made in 1935, and that evidence of an earlier promise by the father was intended merely to establish long-standing donative intent on the part of the father. Similarly, Judge McLaughlin, who denied the credibility of appellant's evidence of a gift in 1935 (R.

156-157), attached no different significance to appellant's testimony in connection with the alleged 1928 promise.² It is clear that Judge McLaughlin understood the case to have been tried only on the theory of an oral gift in 1935. In his opinion he said (R. 153):

The facts found, as I have already indicated, do not bring to my mind a conviction that the plaintiff's father made a gift to him of all of his real estate in Hawaii, *as alleged*, in 1935.

The gift allegedly made, *it is argued*, was made at the last supper of the family prior to the father's permanent departure for Japan. [Emphasis supplied.]

The trial judge went on to remark that appellant alleged the 1928 promise "*in an attempt to bolster up his own testimony*" as to the claimed 1935 gift (R. 154; emphasis supplied.) But even assuming that promise to have been made, still Judge McLaughlin was not convinced that the alleged gift of 1935 had been made (R. 154-157). And certainly neither the trial judge, appellant nor appellee evidenced any understanding of a claim of a promise to give which would not be executed until the father's death.

3. In view of the foregoing there can be no mistaking the fact that this Court has decided the appeal on a theory which was not raised in the pleadings, which was denied by appellant's counsel when the

² In his opinion, Judge McLaughlin assumed the promise to have been made, without passing on the question, merely to show that it could make no difference in the outcome of the case on his understanding of the issues tried (R. 154).

question was specifically raised, and was accordingly a theory which was not thought by the court or by either party to be at issue in the trial of the case. Such a change in the controlling legal theory is sufficient by itself to require an appellate court to allow the aggrieved party an opportunity to be heard on the newly raised issues. But in this case there are additional and even more compelling reasons which we believe necessitate a remand of the case to the trial court for the taking of additional evidence bearing on this newly advanced theory.³

As we have pointed out, *supra*, pages 4-6, this Court has long followed the salutary rule that the appellate court is free to amend pleadings only to the extent that the issues thereby incorporated were actually tried by the express or implied consent of the parties in the trial court and that neither party was misled in that court by the pleadings. But in this case we have seen that neither the trial court nor the parties believed that there was presented for decision any question of promise of gift upon the father's death. If the trial had been conducted on that theory, appellee's defense would have differed in a number

³ As the court pointed out in *Ford Motor Co. v. N. L. R. B.*, 305 U. S. 364, 373:

"It is a familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points."

Compare *Lincoln Gas & Electric Co. v. Lincoln*, 223 U. S. 349; *Fox v. Gulf Refining Co.*, 295 U. S. 75; *Villa v. Van Schaick*, 299 U. S. 152.

of important particulars from the trial as it actually was conducted.

a. Thus, if it had been believed that appellant's case depended upon a promise claimed to have been made in 1928, his credibility as to that assertion would have been at issue just as it was in connection with the claim of a gift in 1935 which he made at the trial. As to the latter the trial judge found appellant's unsupported testimony not credible. As to the former, no finding was believed necessary because the question was not thought to be at issue.⁴ Had it been at issue, there is every reason to believe that Judge McLaughlin would have denied appellant's credibility as to that story as well. The very fact of his disbelief of the claimed 1935 gift suggests that there should be no greater faith in an alleged underlying promise. Insofar as the later claimed gift was said to have been in fulfillment of the earlier claimed promise, it is apparent that the two are interdependent. Disbelief in one strongly suggests disbelief in the other.

b. Furthermore, if the central issue in the trial of this case had been thought to be whether or not there was a promise of gift plus performance of consideration therefor, several additional lines of inquiry would have been necessary. (1) This Court assumed that the father intended after-acquired property to be included in the alleged promise of gift. But the record is silent on that subject, undoubtedly because that promise was alleged only to show donative intent and

⁴ As we have pointed out, Judge McLaughlin merely assumed for purposes of argument that such a promise was made. See note 2, *supra*.

not as the basis for the claim of title. Equally consistent with the limited evidence presented in the trial court is the view that the alleged promise of gift related only to property then owned by the father and that it was fully satisfied by the gift of the car, the store, the bank account, and the stock. (2) There is no indication in the record as to when appellant's performance of the consideration was complete so that equitable title vested in him. Was it in 1928 when he quit school? Was it after he had worked for his father 6 months, 1 year, 5 years, at his father's death, or at some other indeterminate time? (3) Similarly, without knowing the answer to that question it is impossible to determine, in connection with appellant's claim to retain the rental income when, if ever, he might first claim such income. (4) Finally, no evidence was offered at the trial in connection with the important question as to the time for performance contemplated by the alleged 1928 promise. In the trial court all parties apparently assumed that the promise was of a gift to be effective at the father's death or departure from Hawaii, *whichever should be earlier*. Contrary to the understanding of both parties and the court during the trial, this Court has assumed that the effective date of the gift was deferred in the father's discretion until his death.

The decision of this Court does not satisfactorily answer any of these questions; and it is submitted that they can only be inquired into by the trial court. Not until the answers to these underlying questions are known can there be a complete determination of the issue newly posed by this Court. Appellee had

neither occasion nor opportunity in the trial court to cross-examine or present affirmative evidence on any of these questions. They were simply not issues in the case as it was tried. Accordingly, we believe that this Court should withhold judgment in this case and remand for further proceedings in the United States District Court for the District of Hawaii with directions, if desired, to consider the new issue which this Court has raised.

Respectfully submitted.

HAROLD I. BAYNTON,
Acting Director, Office of Alien Property,

FRANK J. HENNESSY,
United States Attorney, San Francisco, Calif.,

JAMES L. MORRISSON,
ROBERT B. MCKAY,
Attorneys, Department of Justice,
Attorneys for Appellee.

CERTIFICATE

I, Robert B. McKay, an attorney for appellee, certify that the foregoing petition for rehearing is in my judgment well founded, and is not interposed for delay.

ROBERT B. MCKAY.

Dated: April 3, 1950, Washington, D. C.

Nos. 12217-12221

**United States
Court of Appeals**

for the Ninth Circuit

No. 12217

SAMUEL HARRY KASINOWITZ, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

and Consolidated Cases

No. 12221

LILLIAN ADELE DORAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

and Consolidated Cases

Transcript of Record

In Four Volumes

VOLUME III.

(Pages 343 to 607, inclusive)

FILED

MAY 31 1949

**PAUL P. O'BRIEN, /
CLERK**

**Appeals from the United States District Court for the
Southern District of California, Central Division**

No. 12221

United States
Court of Appeals
for the Ninth Circuit

LILLIAN ADELE DORAN,
PHILLIP BOCK,
IRVING CARESS,
ROBERT BLAIR,
MERLE BRODSKY,
FRANK SPECTOR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
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In the District Court of the United States in and
for the Southern District of California,
Central Division

Honorable Peirson M. Hall, Judge Presiding:

No. 8796-PH

In Re: LILLIAN ADELE DORAN.

Nos. 8826, 8827, 8828, 8829, 8830-PH

In Re: FRANK EDWARD ALEXANDER,
PHILIP BOCK, BEN DOBBS, SAMUEL
HARRY KASINOWITZ, HENRY STEIN-
BERG.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, Calif., November 4, 1948

Appearances: For the Government: James M. Carter, United States Attorney, Los Angeles 12, California; and Arline Martin, Assistant United States Attorney; and Max H. Goldscheim, Special Assistant to Attorney General, Washington, D. C. [1*] For the Respondents: Gallagher, Margolis, McTernan & Tyre, 112 West Ninth Street, Los Angeles 15, California; by Ben Margolis, Esq.; and John T. McTernan, Esq. [2]

* * * *

The Court: Yes, 11:00 o'clock.

It appears to be a challenge to the grand jury and motion to quash subpoena to appear before the

grand jury in the District Court of the United States, for the Southern District of California. It is signed by Gallagher, Margolis, McTernan & Tyre, by John T. McTernan, and appears to be made on behalf of Frank Edward Alexander, Philip Bock, Ben Dobbs, Samuel Harry Kasinowitz and Henry Steinberg.

Mr. McTernan: Yes, your Honor.

The Court: I have read it. I just read it in chambers.

Mr. McTernan: This motion, if the court please, is made on behalf of the five persons whom you have named, whom you will recall are five of the ten persons who were before your Honor a week ago Monday on charges of contempt, or refusal to answer questions before the grand jury, and whom your Honor sentenced to be committed in the custody of the United States Marshal until such time as they answer, and who were released yesterday pursuant to an order and a mandate, the mandate was spread on the records of this court yesterday, and the order was issued, as you will recall, by Honorable William Denman, Circuit Judge of the United States Court of Appeals for the [6] Ninth Circuit.

Now as these five people, your Honor, stepped from the release cell of the county jail yesterday they were handed subpoenas by the United States Marshal requiring them to appear before the grand jury forthwith and instant.

They appeared, they informed me that they were asked certain questions, and then were told to re-

turn here to the grand jury at 11:00 o'clock this morning.

This is our first opportunity, if the court please, to make this motion, and we make it at this time.

Now the first three grounds of the challenge to the grand jury and the first two grounds of the motion to quash are identical with those which have heretofore been urged to your Honor in connection with the first subpoenas that were served upon these witnesses and since this matter was fully presented to your Honor I will not argue those questions at length here.

The Court: You wish to adopt, however, your argument?

Mr. McTernan: I would like to adopt our record, if the court please, in order to save time. Could it be deemed that at this point the entire record which was made in connection with our motion to quash be included?

The Court: So ordered.

Mr. McTernan: So the record will be clear, that was the record made on October 25, 1948. [7]

The Court: In connection with the identical motion.

Mr. McTernan: The motion is identical on those first three points, your Honor. [8]

* * * *

The challenge and the motion are denied.

Mr. Carter: Will the witnesses be ordered to report? [13]

The Court: Are they here?

Mr. Carter: I think so.

JOHN S. MURDOCK

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name.

The Witness: John S. Murdock; M-u-r-d-o-c-k.

The Clerk: Your address? [16]

The Witness: 106 West Third Street, Los Angeles.

The Clerk: Take the stand.

Direct Examination

By Mr. Goldschein:

Q. You are John S. Murdock?

A. Yes, sir.

Q. On October 27, 1948, were you the official grand jury reporter? A. Yes, sir.

Q. Did you take down in shorthand the questions asked the witness before the grand jury and the answers given by that witness? A. Yes, sir.

Q. Did you transcribe accurately the notes you took? A. Yes, sir.

Mr. Goldschein: Will you mark this for identification, please.

The Clerk: Exhibit No. 1 for the government.

(The document referred to was marked Government's Exhibit No. 1 for identification.)

* * * *

[17]

By Mr. Goldschein:

Q. Mr. Murdock, will you examine government's Exhibit 1 for identification and tell us whether or not that is the testimony of the witness Mrs. Lillian Doran as you took it down and transcribed it?

(Testimony of John S. Murdock.)

A. Yes.

Q. As you took it down in the grand jury room and transcribed it? A. It is.

Mr. Goldschein: I would like to read into the record for the purpose of having the court hear the testimony of Mrs. Doran, the questions she was asked and the answers she gave.

The Court: Do you want the witness to read it?

Mr. Goldschein: Yes. Will you please read it?

The Witness: "Lillian Adele Doran, called as a witness before the grand jury, having been first [19] duly sworn by the Foreman, was examined and testified as follows:

"Examination

"By Mr. Goldschein:

"Q. Your name is Mrs. Lillian Adele Doran?

"A. Yes.

"Q. Are you known by any other name, Mrs. Doran? "A. No.

"Q. At the outset, let me tell you that this grand jury is not investigating you. You are simply called here as a witness to give what evidence you have that the grand jury may be interested in. Do you understand my statement? "A. Yes.

"Q. Mrs. Doran, do you know the names of the officials of the Los Angeles County Communist Party?

"A. I refuse to answer that question on the ground it might incriminate me.

"Q. Do you know the organizational setup of the Los Angeles County Communist Party?

(Testimony of John S. Murdock.)

"A. I refuse to answer that question on the grounds it may incriminate me.

"Q. Do you know Mr. Ned Sparks? [20]

"A. I refuse to answer that question on the grounds it may incriminate me.

"Q. What is your occupation?

"A. Housewife.

"Q. Do you have any occupation other than that?

"A. I refuse to answer that question on the grounds it may incriminate me.

"Q. What is your husband's first name?

"A. Norman.

"Q. Norman Doran? "A. Yes.

"Q. What is his occupation?

"A. He is an electrician.

"Q. Electrician? "A. Yes.

"Q. Who is he employed by?

"A. He is employed by various contractors. I really don't know which ones.

"Q. You don't know what contractors he is employed by at the present time?

"A. Not at the present time.

"Q. Your home address is what?

"A. 1513 West 110th Place.

"Q. Do you understand the term 'incriminate'?

"A. Yes.

"Q. You think, then, or you believe that the answer that you may give to the questions I just asked you which you refused to answer would involve or may involve you in the commission of a crime against the United States government?

"A. I understand the term.

(Testimony of John S. Murdock.)

“Q. You still think that the answer would involve you in the commission of a crime against the United States government?

“A. I understand what the term incriminate means.

“Q. Well, now, will you please answer my last question? “A. Can I see my attorney?

“Q. Do you know what the question is?

“A. Yes.

“Q. Will you repeat the question to me, please?

“A. Do I feel that the answering of these questions would constitute a crime against the government.

“Q. Would involve you in the commission of a crime against the government. “A. Yes.

“Q. Do you want to see your attorney about that?

“A. Yes.

“Q. He is right outside, isn't he?

“A. Yes.

“Q. You will be right back, won't you?

“A. Yes.

“(Short recess taken.)

“The Witness: That is still my complete answer. I refuse to answer on the grounds that it might incriminate me.

“Q. By Mr. Goldschein: Mrs. Doran, we will recess you to reappear before this grand jury at 2:00 o'clock on next Wednesday. Do you understand that?

“A. Yes. All right.”

That is all.

* * * *

FRANCES L. DUFFY

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

* * * *

[24]

Direct Examination

By Mr. Goldschein:

Q. Your name is Frances L. Duffy, is it not?

A. Yes, sir.

Q. Miss Duffy, on November 3, 1948, you were the official court reporter before the grand jury, were you?

A. I was.

Q. And you made shorthand notes of all the questions asked the witnesses and the answers given by them?

A. I did.

Q. Now, Miss Duffy, did you take down in shorthand the questions asked of Mrs. Lillian Doran?

A. Yes, sir.

Q. Will you read the questions propounded to her and the answers she gave?

A. "By Mr. Goldschein:

"Q. Mrs. Doran, you were advised, when you were here before, that this grand jury was not investigating you. Do you recall that?

"A. I don't exactly recall it; no.

"Q. All right, let me repeat it to you so that you will be advised: This grand jury is not investigating you. Now, we are making an investigation with reference to some Federal employees who made a false statement to a Federal agency with [25] reference to their affiliation with certain organizations or clubs or groups of people.

(Testimony of Frances L. Duffy.)

“Now, you understand what I mean by that?”

“A. I understand what you just told me, yes.

“Q. That is right. Now, are you employed by the Federal government? “A. No, I am not.

“Q. Have you ever been employed by the Federal government? “A. No.

“Q. Now, to the best of your recollection, are you personally acquainted with any employees of the Federal government? “A. I don’t recall any.

“Q. Ma’am? “A. I don’t recall any.

“By Mr. Carter:

“Q. By that you mean you don’t know any at this time, or don’t recall any?

“A. Not that I can recall.

“By Mr. Goldschein:

“Q. Do you recall any of the names of your friends or acquaintances that are employees of the Federal government? “A. No. [26]

“By Mr. Kinnison:

“Q. Will you speak up so the reporter can get this?

“A. Okay. At the time, right now, in my immediate circle of acquaintances, I don’t recall anyone that works for the Federal government.

“By Mr. Goldschein:

“Q. Now, do you know Dorothy Healey?

“A. My answer still stands. I refuse to answer on the grounds that it may incriminate me.

“Q. Do you know her business or home address?

“A. I refuse to answer on the grounds it may incriminate me.

“Q. Do you know her occupation?

(Testimony of Frances L. Duffy.)

“A. My answer still stands. I refuse to answer on the grounds it may incriminate me.

“Q. Do you know where she can be located?

“A. I refuse to answer on the grounds that it may incriminate me.

“Q. Do you know whether Dorothy Healey is married?

“A. I refuse to answer on the grounds that it may incriminate me.

“Q. Do you know her husband’s name? [27]

“A. I refuse to answer on the grounds that it may incriminate me.

“Q. Do you know what his occupation is?

“A. I refuse to answer on the grounds that it may incriminate me.

“Q. Now, if you do know it, will you tell us what his occupation is?

“A. My answer still stands. I refuse to answer on the grounds it may incriminate me.

“By Mr. Carter:

“Q. Mr. Goldschein explained to you, I think, on the occasion that you were here before, what was meant by the word ‘incriminate’, did he not? Do you have in mind that discussion?

“A. As I recall, Mr. Goldschein asked me if I understood the term ‘incriminate myself’.

“Q. You understand that the privilege against self-incrimination only applies to such things as might incriminate you, and not things that might incriminate some friend or acquaintance of yours, do you not?

“A. I understand the term ‘incriminate’.

(Testimony of Frances L. Duffy.)

“Q. You understand it is a privilege that concerns only you, and doesn’t apply to anything that might incriminate a friend or acquaintance? [28]

“A. I still stand on my answer.

“By Mr. Goldschein:

“Q. Do you understand the statement Mr. Carter made to you? The privilege against self-incrimination applies to you alone, if you feel that you may become involved in a crime against the Federal government. However, it does not apply if you are fearful that some friend of yours may become involved in a crime, and not you. Do you understand that? “A. Yes.

“Q. And you still refuse to answer?

“A. Yes.

“By Mr. Carter:

“Q. You understand, also, do you not, that, although you as a witness may claim your privilege or refuse to answer, you do not ultimately decide whether you have that privilege? “A. Yes.

“Q. But that some judge decides whether your claim of privilege is well founded?

“A. Yes, I understand that.

“Q. And you still stand on your refusal and refuse to answer those questions? “A. Yes.

“Mr. Goldschein: All right, will you wait in the anteroom, please.”

* * * *

[30]

Mr. Goldschein: That is all with reference to the witnesses.

We respectfully request that the court give the witnesses an opportunity to explain to the court pri-

vately in chambers any matters that the witness may feel would tend to show that the answer to the question would tend to incriminate her for the violation of a Federal offense.

The Court: If the witness desires it, she may.

Mr. Margolis: We would like to go ahead. We have some motions to make, your Honor.

The Court: Does the witness desire——

Mr. Margolis: Before we take up that matter, we have some other matters. In due course we will present our case, your Honor, and we do not think it is up to the government——

The Court: What is your motion, Mr. Goldschein?

Mr. Goldschein: We move that the witness be instructed that she must answer the question because on the face of the question we can't possibly conceive how the answer would tend to incriminate the witness of a Federal offense.

* * * *

The Court: You initiated the proceedings. It was your motion to quash, as I remember, that started these proceedings, was it not?

Mr. Margolis: We initiated them? The proceedings were initiated by the subpoena ordering these people before the grand jury. We didn't say, "Come and serve us with a subpoena so we can make a motion to quash."

The Court: But you initiated the proceedings before the court. The fact remains that I have endeavored to give you prompt hearings in connec-

tion with your matters. I have heard you as fully as you wanted to be heard.

* * * *

The Court: There was no stay of the grand jury proceedings, there was no order of any court dissolving the grand jury, there is no writ of prohibition prohibiting this court from considering the matter, no injunction or restraining order issued against the United States Attorney from doing what he considered to be his duty, or the Attorney General, and the grand jury have the right to inquire, if they chose to inquire yesterday. That is their business.

* * * *

Mr. McTernan: If the court please, the first matter which we would raise in this proceeding is the challenge to the grand jury. Now, perhaps we can save some time here, your Honor, by incorporating the record that was made on October 25th in connection with the other witnesses.

The Court: If you desire, unless there is some objection to that. Is there, Mr. Goldschein?

Mr. Goldschein: No, sir.

The Court: Then I will make an order to the effect that all evidentiary and other matters and things offered on behalf of any of the witnesses in connection with the previous [49] proceedings and objection to the motion of the government for an order directing them to answer the question be and are now incorporated in evidence and a part of the record in this case to the same force and effect as if they were again offered here in haec verba.

Mr. McTernan: Thank you.

In order that your Honor's reference be complete may I read the title and number of the cases there involved?

The Court: Very well.

Mr. McTernan: In re Ben Dobbs, Philip Bock, Delphine Murphy Smith, Frank Edward Alexander, Miriam Brooks Sherman, Samuel Harry Kasinowitz, Mrs. Dorothy Baskin Forest, Mrs. Charles Holister Noble and Wesley Bissey, Nos. 8786-PH to and including 8795-PH.

The Court: Consolidated.

* * * *

[50]

Mr. McTernan: Now, your Honor, in connection with the claim of self-incrimination—and I would like the record to specifically include certain matters that were involved in this other record so there may be some repetition but I think it is important for this record—you will recall that I believe it was defense Exhibit A in the Dobbs record, to which your Honor just referred, there was a copy of an indictment returned by the grand jury for the Southern District of New York charging 12 persons, William Z. Foster, et al., with a conspiracy to violate the Smith Act, 18 USCA, Section 10, and that witnesses' exhibit—whatever the proper designation was—was a copy of an indictment returned by the grand jury for the Southern District of New York against an individual defendant—I think his name was William Z. Foster but I am not sure—in any event it was stipulated that the individual indictments against the 12 persons were identical in language

except for the name of the defendant. We would like that those exhibits be deemed also a part of this record.

The Court: Everything that was in the other record.

Mr. Goldschein: And the objection of the government to the introduction of those also should be included.

The Court: Very well. All objections, all offers, all matters, things and exhibits. I do not know of a broader word than "things". [51]

Mr. McTernan: We agree that "things" is meant to be all-inclusive.

The Court: Everything.

* * * *

[52]

I take it the government will stipulate that the indictment has not been dismissed by the government and is still pending?

Mr. Goldschein: Yes.

The Court: Without waiving your objection as to its materiality?

Mr. Goldschein: That is right.

The Court: Very well.

Mr. McTernan: At this time, your Honor, I will make a short offer of proof so that our record will be complete.

We offer to prove, if we are given an opportunity, that motions to dismiss were filed against both the conspiracy indictment and the individual indictments attacking the legal sufficiency of those indictments, and that those motions to dismiss have been denied by a judge of the United States District [54] Court for the Southern District of New York.

We further offer to prove that the trial on the conspiracy indictment is now set for November 15, 1948.

Mr. Goldschein: We are objecting, may it please the court, as previously.

The Court: It is immaterial. Objection sustained.
* * * *

Mr. McTernan: Yes, your Honor.

Let us go back to semantics for a moment, your Honor.

The order which you entered just before the recess incorporated all matters and all things dealing with all objections [55] and all motions and any other defense that was raised to the question involved in the proceedings on October 25th.

The Court: That is right.

Mr. McTernan: And it was not limited simply to the grand jury challenge.

The Court: That is correct.

* * * *

[56]

JAMES M. CARTER

called as a witness by and in behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, sir.

The Witness: James M. Carter.

Direct Examination

By Mr. McTernan:

Q. Are you the United States Attorney for this district, Mr. Carter?

A. I am.

Q. You have been engaged, have you not, in

(Testimony of James M. Carter.)

presenting matters to the same Grand Jury in connection with the proceedings of which Mrs. Doran was called as a witness?

A. Other matters, you say?

Q. No. I will reframe my question.

You have been engaged, have you not, in presenting the matters to the Grand Jury in connection with which Mrs. Doran was called as a witness?

A. I have.

Q. And you were in the Grand Jury room when Mrs. Doran was called to testify, were you not?

A. I was. [57]

Q. Mr. Carter, you have information, do you not, that Mr. Ned Sparks is an official of the Communist Party?

Mr. Goldschein: We object to that, may it please the Court. The Grand Jury is investigating that matter.

Mr. Carter: I would like to add to that objection, objected to upon the further ground that the information I may have in my possession is of a confidential nature and as an employee of the government I am not required to disclose that information publicly.

* * * *

Mr. Carter: You are asking me, as I understand you—[58] if I may now step out of my role as witness into my role as counsel—you are asking me if I have information in my capacity as United States Attorney that Mr. Ned Sparks is a member of the Communist Party.

(Testimony of James M. Carter.)

Mr. McTernan: I did not ask you in what capacity you obtained the information, Mr. Carter.

Mr. Carter: I will answer your question in my private capacity.

The Court: Just a moment. It is difficult to keep the record straight here.

Just from the foundation laid of it by counsel he asked you if you were the United States Attorney and he is asking you now in that capacity, I take it.

Mr. Carter: In that capacity we make the objection, your Honor, that information I have in connection with cases in my office comes from various sources, including confidential reports of the FBI, including information from people who call or write my office—a lot of confidential information.

The Court: I think the objection is good. I do not think in a proceeding where a Grand Jury is investigating, that is a grand inquisition, that the prosecutor can be called down and compelled by an objection on the part of a witness to disclose any sources of information that he may have concerning a subject matter which apparently is under [59] investigation.

Mr. McTernan: Your Honor, let me make myself clear. I don't want to know the sources of his information.

The Court: You were just asking what his information was.

Mr. McTernan: I only want an answer to this

(Testimony of James M. Carter.)

one question. All I want to know is whether he has information as to the official position of Ned Sparks in the Communist Party.

Mr. Goldschein: And that is what we are objecting to, your Honor.

The Court: The objection is sustained.

* * * *

Mr. McTernan: We offer to establish through this witness, your Honor, if permitted to ask a question, that he knows that Ned Sparks is an officer of the Communist Party, and situated in Los Angeles [62]

* * * *

Mr. McTernan: May I add to that, and that is the reason why the question was put to Mrs. Doran substantially "Do you know Ned Sparks?"

Mr. Goldschein: We are objecting to any offer of proof on that question, may it please the Court. Mr. Carter is now a witness of Mr. McTernan's and certainly Mr. McTernan can't impeach his own witness.

The Court: It is immaterial what the District Attorney knows. The Grand Jury is inquiring. The offer of proof is denied. The objection to it is sustained.

By Mr. McTernan:

Q. Mr. Carter, you, in your private capacity, have read in the newspapers in Los Angeles that Ned Sparks is an [63] officer of the Communist Party, have you not?

(Testimony of James M. Carter.)

Mr. Goldschein: We are objecting to that, may it please the Court, as being immaterial.

The Court: Objection sustained.

* * * *

Mr. McTernan: We offer to prove through this witness, your Honor, that he has learned through newspaper reading that Ned Sparks is an officer of the Communist Party and situated in Los Angeles.

The Court: It is immaterial what he knows, what he has learned, what he has read, so far as the inquiry is concerned. The inquiry is by the Grand Jury.

By Mr. McTernan:

Q. You have information, do you not, that Dorothy Healey is an officer of the Communist Party? [64]

Mr. Goldschein: Same objection.

The Court: Same ruling.

By Mr. McTernan:

Q. You have information, have you not, that Dorothy Healey is an officer of the Communist Party and is situated in Los Angeles?

Mr. Goldschein: Same objection.

The Court: Same ruling.

Mr. McTernan: We offer to prove through the testimony of this witness, if we are permitted to ask the questions, that this witness has information that Dorothy Healey is an officer in the Communist Party which is situated in Los Angeles. That is the reason why the question "Do you know Dorothy

(Testimony of James M. Carter.)

Healey'' was propounded to the witness Mrs. Doran before the Grand Jury.

Mr. Goldschein: Same objection.

The Court: Same ruling.

By Mr. McTernan:

Q. Now, Mr. Carter, you have read in the newspapers in Los Angeles that Dorothy Healey is an officer of the Communist Party, have you not?

Mr. Goldschein: Objected to as immaterial and incompetent.

The Court: Objection sustained.

Mr. McTernan: We now offer to prove, your Honor, if permitted [65] to ask—I will withdraw that and ask another question.

Q. You know from sources completely unconnected with your capacity in the Department of Justice, do you not, that Dorothy Healey is an officer of the Communist Party?

Mr. Goldschein: I object to that question on the same grounds.

The Court: Same ruling; objection sustained. It is immaterial what he knows, whether he knows it privately or officially or in any other way.

Mr. McTernan: I want to establish if I can through this witness that Dorothy Healey is an officer of the Communist Party, and I want to establish that in connection with the fear of incrimination by Mrs. Doran.

The Court: It is immaterial what this witness knows. The inquiry is by the Grand Jury.

Mr. McTernan: I can prove that fact through

(Testimony of James M. Carter.)

any witness I choose to call, if your Honor please, and this is a witness I choose to call. I am not asking him anything now about his official knowledge.

The Court: The objection is sustained.

Mr. McTernan: We offer to prove through this witness, if we are permitted to ask the question, that Dorothy Healey is an officer of the Communist Party, that she is situated in Los Angeles, and we offer to prove this in connection with [66] the witness' claim of the privilege against self-incrimination with respect to the following questions which were put to her before the Grand Jury on November 3, 1948—and I am reading from my notes; I will give them as correctly as I can—do you know Dorothy Healey? Do you know her business or home address? Do you know her occupation? Do you know where she can be located? Is she married? What is her husband's name? Do you know the occupation of her husband? If you do know it, what is it?

That completes my offer, your Honor.

Mr. Goldschein: I object to all those questions as being immaterial and incompetent.

The Court: Objection sustained.

* * * *

By Mr. McTernan:

Q. Is Ned Sparks an officer of the Communist Party?

Mr. Goldschein: We are objecting to that, may it please the Court. That has been gone over and over again.

(Testimony of James M. Carter.)

The Court: What is the ground of your objection?

Mr. Goldschein: This is a matter under investigation by [67] Grand Jury. He tried to develop that. It is immaterial what Mr. Carter knows.

Mr. Carter: Let me make the objection broader. Also upon the ground that as an official of the Department of Justice, information that I have is privileged and when Mr. Goldschein in the past has stated "same objection" I think the record should show that that means the various objections we made, including the objection to divulging information I may have as an officer of the Department of Justice.

The Court: The objection is sustained.

By Mr. McTernan:

Q. Mr. Carter, when I ask you this question I am not asking you for any information which you may have as the result of your position with the Department of Justice. Is Ned Sparks an official of the Communist Party?

Mr. Goldschein: May it please the Court, we have gone over that before.

The Court: It has just been asked and answered.

Mr. McTernan: I didn't know the ground of your Honor's ruling.

The Court: All the grounds that were assigned in addition to the ground that it was immaterial.

(Testimony of James M. Carter.)

The Court: Yes, that is right. Do you know Ned Sparks?

Except for the one question, do you have any occupation other than that, all these are "do you know."

Now as I tried to make plain the other day in the various hearings that we have had, I cannot see how a person can be incriminated by knowing Dorothy Healey, Ned Sparks, Dorothy Healey's home address, business address, occupation, located where, married, husband's name or occupation, and so forth. In other words, I thought I made it clear that my position on it is that it is not a crime to know.

Mr. McTernan: Perhaps I haven't sufficiently stated our position, your Honor, and I might be able to assist the court if I made a restatement at this time.

The Court: You may restate it but I think it has been stated quite a few times and I think that I understand it.

Mr. McTernan: If you will permit me to take just a moment so there won't be any misunderstanding.

The Court: Very well.

Mr. McTernan: We are trying to prove through this witness that Ned Sparks and Dorothy Healey are officials of the Communist Party here in Los Angeles. It is our position that if the answer of this witness might show that she knows Ned Sparks, that she knows Dorothy Healey, or that she knows

(Testimony of James M. Carter.)

these details about Dorothy Healey's private life, which could be a link in tying her in with the Communist Party because this witness wouldn't know, one way in which this witness might know these people and know these details about them, is the fact that she is a member of the Communist Party, and then if she gave this answer this would be a link to tie her in with the Communist Party, and because they indict people now because they are members of the Communist Party she [70] would be subject to prosecution under Section 10 of the Smith Act. I am not sure if it is Section 10, but it is the Smith Act, 18 USCA Section 10.

So as part of our defense, if it may be called that, to this motion we are seeking to show that these two people are officials of the Communist Party as a foundation stone, as it were, to proving the rest of our defense, which I have just spelled out to you.

The Court: That was the position which I understood you had taken before and have consistently taken since the proceedings on the various witnesses began.

Mr. McTernan: Yes.

The Court: And I had so understood it, and I had that understanding of it in making my rulings that it is immaterial.

* * * * [71]

Your Honor, before proceeding with the next step we are going to ask that the witness be permitted to make a statement to your Honor under

the same conditions and terms as such statements were previously made. I understand your Honor will entertain that kind of a statement.

The Court: Yes, if the witness desires it.

Mr. Margolis: Before proceeding to that, however, your Honor, we have some other matters to offer.

* * * *

Mr. Goldschein: We will agree, may it please you Honor, that these are newspaper clippings, that is all.

Mr. Margolis: On the dates that they purport to bear?

Mr. Goldschein: As to the dates.

However, we do not agree as to their materiality. We insist, may it please the Court, that they are immaterial in this case, that there is no showing here that the witness has anything to fear from the stories that appear in the newspapers.

The Court: He has not offered them yet. In other words, what the government has done is waived foundation.

Mr. Goldschein: That is right.

Mr. Margolis: Your Honor please, as the witness' exhibit next in order we would like to offer this clipping.

The Court: That will be Exhibit 1. These are separate proceedings.

Mr. Margolis: I see. Then the incorporation of others by reference doesn't give those exhibit numbers the same exhibit numbers here, I guess. That is the only question I had in mind.

The Court: How many exhibits have we had?

The Clerk: A and B. [74]

Mr. Margolis: My thought was we should reserve A and B for the others, if that is all there were. This would be C then.

The Court: This will be C.

Mr. Margolis: I would like to offer this then as the witness' Exhibit C, your Honor, a portion of a page of the Los Angeles Examiner for July 21, 1948, and particularly that portion of it which appears at the left-hand side of the front page with the heading, "Seven Arrests; Charge Plot Against Government," which is a double column and continues to the bottom of the page with the notation "(Continued on Page 2, Column 6)," and which goes over on the back side of the same page, which is page 2, to column 6 and continues on into column 7, and particular to that portion of the article reading as follows—before reading it I might state what the article is generally about because otherwise it would have no meaning.

The article refers to the arrest of and the indictment against what the newspaper article refers to as the "ranking leaders of the (Communist) Party," and in what the newspaper says is "in the greatest crackdown on Communists in the nation's history."

Mr. Goldscheine: Excuse me.

May it please the Court, I think it would take less time, and since time is important here, if the Court would read it and let them be made an ex-

hibit and filed as an exhibit in the [75] record. It will take less time.

Mr. Margolis: I ask leave to present the matter in this fashion because it is a long article and I want to indicate the part which I think is most material and the reasons for its materiality.

We are particularly interested in the portion on page 2 reading as follows—

The Court: Counsel, I think you should make your offer and if government counsel has any objection then he can state it. But what you are doing is reading it into the record.

Mr. Margolis: I am particularly offering this particular language, your Honor, and an offer is often made by being read into the record. I want the particular language indicated and directed to your Honor's attention. It is only two paragraphs long. I could have read it three times by now.

The Court: So could I.

Mr. Margolis: But the point is, it is a part of a much larger article. That portion reads:

“Local Federal attorneys indicate that the indictment and arrest of Foster may be the forerunner of a possible nation wide roundup of all American Communist Party members, or persons known to be associated in Communist activities.

“Conviction under the Smith Act carries with it maximum punishment of 10 years in prison and a [76] fine of \$10,000 on each count.”

I offer this as indicated, your Honor.

The Clerk: Exhibit C.

(The document referred to was marked Respondents' Exhibit C for identification.)

The Court: You offer it in evidence?

Mr. Margolis: I offer it in evidence.

Mr. Goldschein: We are objecting to it, may it please the Court, as being immaterial and incompetent in these proceedings. It is hearsay.

Mr. Margolis: Your Honor, I was wondering which counsel was handling the matter.

Mr. Goldschein: You are: I will let you finish. Go right ahead.

Mr. Margolis: Go ahead, counsel.

Mr. Goldschein: We are objecting, may it please the Court, firstly as a basis before that would become competent the defendant would have to admit or show some evidence that their client advocated the overthrow of the government by force, and therefore has some fear of giving some evidence that would tend to incriminate her for that offense.

Mr. Margolis: I think that argument requires no answer.

The Court: It states "local Federal attorneys," and this is dated "New York, July 21."

Mr. Margolis: Yes, your Honor.

The Court: The item is dated New York.

* * * *

Mr. Margolis: This is offered upon the basis that these newspaper articles of the Los Angeles Examiner—I need hardly tell your Honor that the Los Angeles Examiner has wide circulation—and

that this is a basis indicating the fear which led to the invoking of the privilege against self-incrimination, just as an article was used in the Weisman case to the same effect.

The Court: What is the basis of your objection? Had you stated it?

Mr. Goldschein: May it please the Court, my objection is that there is nothing before this Court upon which this Court can take judicial notice that this woman actually has a fear of being involved under the Smith Act. [78]

The Court: That it is immaterial to prove what?

Mr. Goldschein: It is immaterial to prove that fact, that that story has absolutely no connection with the investigation at bar, and it proves nothing in the case.

Mr. Margolis: It proves that such a fear might reasonably exist, your Honor. That is why we offer it, that a reasonable person, in view of that sort of an article, in view of the fact that this is the greatest roundup of Communists in the history of the United States, the assertion that this is the beginning of rounding up all of the Communists, that everybody who is a member or associated with the Communist Party is threatened by it, this I say could place a person in reasonable fear.

Mr. Carter: We object on the further ground that there is no showing in the record that Ned Sparks or Dorothy Healey are members of the Communist Party.

The Court: It is immaterial. The objection is sustained. It will be marked for identification.

* * * * [79]

The Court: They have waived the foundation. It is just on the ground it is immaterial.

Mr. Margolis: Yes, I understand.

I now offer a portion of the Los Angeles Examiner dated Friday, September 17, 1948, being a part of a column entitled "Washington Scene," by George Dixon, appearing on page 23, in which the statement is made that "The Department of Justice will seek indictments against well-known Communists in key cities all over the country. The Department of Justice will go before Grand Juries with evidence gathered by its own agents."

Then it goes on to say the purpose of the investigation, that "It is designed to overplay and overshadow any cracks Dewey might make on Administration laxity in prosecuting enemies of the country."

We say this is how this investigation was started. This is the motivation and it is continuing as a result of that initial political motivating power.

We offer this for the same reasons heretofore stated as the witnesses' Exhibit D.

(The article referred to was marked Respondent's Exhibit D for identification.)

Mr. Carter: We object to the admission of the exhibit in evidence, and as part of my objection I want for the record to straighten one thing out. [80]

In our motion to require this witness to answer we desire to be limited by the Court to those ques-

tions starting with her knowledge of Dorothy Healey, eliminating the first two questions, eliminating the question, Do you know the officers of the Communist Party, eliminating the question, Do you know the party organization, and eliminating those questions for the reason that those questions are the identical questions involved in the matter before the Court, and those questions were asked of this witness before the proceeding before Judge Denman and it just happens that the witness is now brought before the Court.

The government's motion to require this witness to answer will concern itself with those questions that were asked in that part of the transcript where the question occurred after the proceedings before the Circuit beginning with the question—

The Court: Do you know Ned Sparks?

Mr. Carter: Yes, do you know Ned Sparks.

Then with that correction of our position in the record we object upon the ground that this document is immaterial, not the best evidence, hearsay, does not tend to prove or disprove any of the issues in this case.

The Court: Objection sustained. It will be marked for identification.

* * * * [81]

I offer an article, portion of an article, appearing in the Los Angeles Times dated Tuesday morning, October 26, 1948. On the first page thereof the article is entitled "U. S. Court Acts When They Spurn Questions Before Grand Jury," and the main heading being: "Ten witnesses before an ex-

traordinary session of the Federal Grand Jury were jailed for contempt of Court last night after they refused to answer questions * * *"

In this article we direct your Honor's attention particularly to the following portions which are very brief. The word that is used is "Carter," and it is evident from previous parts of the article that it refers to United States District Attorney Carter.

Mr. Goldschein: We are objecting to a description by counsel. We think he ought to read it as it is or let the Court see it.

Mr. Margolis: Very well.

"Carter yesterday called the Grand Jury into extraordinary session to consider charges of Communistic sympathy."

Another portion of the article:

"U. S. Attorney Carter refused to comment on the exact nature of the inquiry and said merely [83] that 'a number of witnesses have been subpoenaed to testify regarding an investigation begun several months ago. The Grand Jury inquiry may continue for some time.'

"He explained that 'unless happenings occur in open Court in connection with the Grand Jury proceedings, no further information can be supplied in view of rule of secrecy applied to the Grand Jury's activities.'

"From other sources it was learned that the current inquiry resulted in part from refusals of various persons to answer questions of FBI opera-

tives conducting a routine loyalty check of U. S. employees and others.”

We offer this, if your Honor please, the entire article including the parts which I have read, as witness’ Exhibit E.

(The article referred to was marked Respondents’ Exhibit E for identification.)

Mr. Carter: It is objected to on the same grounds heretofore stated, and upon the further ground that I didn’t state in the last offer, that there is no showing in the record that Dorothy Healey is a Communist or that Dorothy Healey advocates the overthrow of the government by force, on the ground that the exhibit is immaterial, not the best evidence, [84] and it is hearsay.

The Court: Objection sustained.

Mr. Margolis: I now offer, if your Honor please, an article appearing on the first page of the Los Angeles Examiner for Wednesday, October 27, 1948, the column being the fifth column over, reading: “Officials Plan ‘All-out’ Red Inquiry Here,” and referring also to the same investigation, and reading in part as follows:

“Communist groups and activities in Southern California are scheduled to undergo a ‘top-to-bottom’ investigation by a special Federal Grand Jury here.

“This was indicated by high government officials yesterday, after ten witnesses were committed to jail for refusing to answer Grand Jury questions.

“‘This is only the opening gun in the government’s inquiry into subversive and disloyal groups,’ United States Attorney James M. Carter declared.”

I offer this, if your Honor please, for the same reasons.

Mr. Goldschein: What is the date of that?

Mr. Margolis: October 27, 1948.

Mr. Carter: Objected to on the grounds heretofore stated to the last exhibit. [85]

The Clerk: Exhibit F.

The Court: Same ruling.

(The document referred to was marked Respondents' Exhibit F for identification.)

Mr. Margolis: Next, your Honor, I offer the Los Angeles Times, front page, Wednesday morning, October 27, 1948, and the article appearing on that page is headed: "Silent Witnesses May Get 18 Months," and particularly that portion of the article reading as follows:

"Both Carter and Goldschein said that in the event the inquiry turns up evidence of communistic activities other than among Federal employees they will investigate any such cases and prosecute if sufficient evidence is uncovered."

We offer that as the witnesses' exhibit next in order.

The Clerk: G.

Mr. Carter: Objected to upon the grounds heretofore stated.

(The article referred to was marked Respondents' Exhibit G for identification.)

* * * * [86]

Mr. Goldschein: Yes, may it please the court, but before we go into that, before we leave this mat-

ter, we respectfully ask the court to give the witness an opportunity, at their request, to be heard by the court so that the court can determine whether or not the witness can disclose to the court or tell the court how the answer to that question would tend to incriminate her for the violation of a Federal offense so that the court can determine that question.

The Court: That was the request just made by Mr. Margolis.

Mr. Goldschein: Excuse me. I am sorry. I didn't understand that.

Mr. Margolis: We are willing to have the witness make that kind of a statement.

The Court: Do you request it?

Mr. Margolis: The witness is willing to make that statement.

The Court: Do you request the opportunity?

Mrs. Doran: Yes.

* * * *

STATEMENT OF WITNESS LILLIAN ADELE DORAN

(The following proceedings were had in chambers, as follows):

The Court: Let the record show that there is present the witness, Mrs. Doran, the reporter, Mr. Wahlberg, the Clerk, Mr. Horn, and the bailiff, Mr. Brand.

Mrs. Doran, you heard the statement of your counsel that you desire an opportunity to make a statement to me in chambers?

Mrs. Doran: Yes.

The Court: I am extending you that opportunity now with the order that these proceedings shall be private and confidential unless and until you or your counsel indicate otherwise.

Now if there is some statement you wish to make to me which you think might shed some light on the question of whether or not the questions pending will incriminate you, will you do so?

Mrs. Doran: Thank you.

First of all, I would like to say that I do have these notes here in order refresh my memory. Is that all right?

The Court: Those are notes that you have written?

Mrs. Doran: I have written them myself, in my own handwriting. [91]

The Court: Yes.

Mrs. Doran: And these notes proceed to say that I have read in the papers articles before I appeared at the Grand Jury and they were spread all over the papers about so-called "Red" hearings and about the New York indictments and the 12 Communist leaders and about the Attorney General's findings that the Communist Party advocated force and violence, and there have been in the papers certain deportation cases based solely on this ground, that these people were subversive or Communists, and that the Attorney General was planning to bring several indictments in Los Angeles.

Therefore I refused to answer those questions when I was called before the Grand Jury because of the fear that my answers might tend to connect

me with and be a part of a chain of evidence tending to establish that I am a member of the Communist Party, and that therefore I might be indicted as a follow-up of such procedure.

The Court: Now you mentioned something there about deportation. Is there some peculiar relationship you have in connection with that? I mean to say, you are **native-born?**

Mrs. Doran: Yes, I am native-born.

The Court: In other words, there is no question of you being a citizen of any other country?

Mrs. Doran: No, no. [92]

The Court: So you do not have any fear that you would be deported?

Mrs. Doran: No.

The Court: I see.

Mrs. Doran: Not on any grounds that I am not a citizen.

The Court: I understand. Not on any grounds in connection with this?

Mrs. Doran: No.

The Court: Your fear of being deported, if you have any at all, does not arise from this?

Mrs. Doran: No.

The Court: Do you have some other statements to make?

Mrs. Doran: No.

The Court: There may be some reason which is in your mind and which you do not want to tell your lawyers about?

Mrs. Doran: No.

The Court: Frequently people find themselves in

that position. But you do not have any other statement to make?

Mrs. Doran: No.

The Court: Very well. We will return to the court room. [92]

* * * *

I have talked with the witness in chambers and she has made a statement, but from her statement no additional facts or reasons appear other than that indicated by counsel which might show or tend to show that answering the questions indicated by government counsel would incriminate or tend to incriminate her.

For that reason the order of the Court will be that the witness is ordered and directed to answer the following questions—and in that connection I would like also to observe that Government's Exhibit 1, the Transcript of the Testimony before the Grand Jury, is entitled "In the Matter of: Loyalty of Government Employees." The questions are:

Do you know Ned Sparks?

Do you have any occupation other than that? (She having previously indicated that she was a housewife.)

The next questions: Do you know Dorothy Healey?

Do you know her business or home address?

Do you know her occupation?

Do you know where she can be located?

Do you know whether Dorothy Healey is married?

Do you know her husband's name?

Do you know what his (her husband's) occupation is?

And the tenth question: If you do know it, will you tell us what his occupation is?

Mrs. Doran, you understand the order of the Court, do [93] you?

Mrs. Doran: Yes.

* * * * [94]

FRANCES L. DUFFY

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name for the record.

The Witness: Frances L. Duffy.

Mr. Goldschein: This is relative to Philip Bock.

The Clerk: No. 8827-PH.

The Court: This is a new proceeding, Mr. Clerk, against these same parties.

The Clerk: Yes. We have given it a number.

Mr. Goldschein: I was looking for Mr. Bock.

Mr. Bock: Here.

The Court: Mr. Bock is here.

Direct Examination

By Mr. Goldschein:

Q. You are Miss Frances L. Duffy?

A. Yes, sir.

Q. On November 3, 1948, were you the official court reporter who took the testimony in the Grand Jury room? [98]

(Testimony of Frances L. Duffy.)

A. I was.

Q. Were you present when Philip Bock testified?
A. I was.

Q. Did you take down in shorthand the questions asked him and the answers he gave?

A. Yes, sir.

Q. Will you please read the questions asked and the answers he gave.

* * * *

The Witness: "Mr. Goldschein: Mr. Philip Bock, recalled.

"Mr. Bock, I believe we advised you before, when you were here before, that we are not [99] investigating you. We want you to know now that we are making an investigation with reference to Federal employees who have made a false statement to a Federal agency with reference to their affiliations with certain organizations, clubs or groups of people.

"By Mr. Goldschein:

"Q. Now, you are not employed by the Federal government, are you?

"A. No, I am not employed by the Federal government.

"Q. Sir? A. I am not.

"Q. Have you ever been employed by the Federal government?

"A. I have just been released from ten days in jail. I got out of there three minutes ago. I haven't had a chance to consult with my attorney. I know that every statement I make here is important, and might or might not incriminate me and, before I

(Testimony of Frances L. Duffy.)

let myself in for a line of questioning, I would like to consult with my attorney.

“Q. Now, do you think that answering the question of whether or not you have ever been employed by the Federal government can in any way affect you, if you have not been employed by the government?

“A. I feel that I have been persecuted, and I would like to speak to my attorney——

“Q. We are not interested in your views, Mr. Bock. We want to know whether you will answer the question.

“A. I was employed by the Federal government. I was a first lieutenant in the United States Air Force.

“Q. Answer the question.

“A. I flew 50 missions in Italy. I won——

“Q. Just a minute; just a minute.

“A. ——a Flying Cross. I won five clusters——

“Q. Wait. We asked you a question. Answer the question.

“A. You asked if I was employed by the Federal government.

“Q. The answer is ‘yes’ or ‘no.’

“A. Yes.

“Q. Did you ever hold any civilian employment with the Federal government?

“A. May I have permission to consult with my attorney?

“Mr. Goldschien: Yes, you may. [101]

“The Witness: May I consult with him now?

(Testimony of Frances L. Duffy.)

“Mr. Goldschein: Yes, you may consult with him now. We will recess you two minutes so you can consult with him, and come back.”

The witness later returned to the hearing room.

“By Mr. Goldschein:

“Q. Mr. Bock, did you talk to your attorney?

“A. Yes.

“Q. All right. Now, Mr. Bock, to the best of your recollection, are you personally acquainted with any employees of the Federal government?

“A. To the best of my recollection, I am not acquainted with any employees of the Federal government.

“Q. Do you know Dorothy Healey?

“A. I refuse to answer that question on the grounds that it might tend to incriminate me.

“Q. Do you know her business or home address?

“A. I refuse to answer that question on the grounds it might tend to incriminate me.

“Q. Do you know her occupation?

“A. I refuse to answer that question on the grounds it might tend to incriminate me, and any other questions about her.

“Q. Do you know where she can be located?

“A. No.

“Q. Do you know whether Dorothy Healey is married?

“A. I refuse to answer that question on the ground it might tend to incriminate me.

“Q. If so, what is her husband's name?

"A. I refuse to answer that question on the ground it might tend to incriminate me.

"Q. Do you know what his occupation is?

"A. I refuse to answer that question on the ground it might tend to incriminate me.

"Q. If so, what is it?

"A. I refuse to answer that question on the ground it might tend to incriminate me.

"Mr. Goldschein: All right sir. Mr. Bock, will you be back tomorrow at 11:00 o'clock. We will recess you until that time."

Mr. Goldschein: May it please the court, the government insists that there is nothing in those answers that will tend to incriminate the witness of a violation of a Federal statute. We respectfully request that the court instruct the witness that he must answer the questions.

The Court: There is one, were you ever employed by the government in a civilian capacity—

Mr. Goldschein: Eliminate that. He has answered that [103] question.

The Court: No, he did not. He refused to answer that on the ground that it might incriminate him, and in view of the nature of the inquiry by the grand jury it would seem to me that if he were forced to answer that question it might or might not incriminate him.

Mr. Carter: We agree with your Honor.

The Court: So your motion is denied on that question.

As to the remainder of them, I will hear you.

Mr. Margolis: Your Honor please, first of all we

(Testimony of Frances L. Duffy.)

wish to make a motion for a continuance upon all of the grounds stated in the case of Mrs. Doran, the preceding case, and upon certain additional grounds.

The Court: It will be deemed that all of the grounds stated in the Doran case may be offered and considered as offered and as a part of the record the same as if they had been repeated here.

Mr. Margolis: Thank you.

The Court: And all matters and things in support thereof.

Mr. Margolis: In addition we would like to point out the following facts:

This witness was subpoenaed about 7:00 a.m. a week ago Monday. From that time on for the rest of the day he was in his attorney's office, in court, before the grand jury, except [104] for meal time, for the balance of the day until about 12:30 at night. At that time he was ordered committed to the custody of the United States Marshal until such time as he should answer certain questions.

Pursuant to that order he was taken by the United States Marshal to the county jail and remained in the county jail until approximately 5:00 p.m. yesterday, which was November 3rd, during all of which time he was entitled, according to the ruling of Judge Denman, to have been on bail or to have his execution stayed. But it was not stayed. He spent that time in jail.

Immediately upon his stepping——

The Court: Pardon me. Do you want to examine this lady, counsel?

Mr. Margolis: No, I have no questions. We don't question the accuracy of the reporter's transcript.

The Court: You may step down.

(Witness temporarily excused.)

Mr. Margolis: He was served with a subpoena to appear forthwith instanter before the grand jury as he was stepping out of the jail door; he had one foot out of the jail door, not the second one, when he was served with this subpoena. No opportunity to go home, no opportunity to adjust himself to his newly won liberty, no opportunity to consult with his counsel—but immediately forthwith before the grand jury. [105]

And he appeared pursuant to that order together with the others. At that time he was questioned and ordered to come back about, I think, 11:00 o'clock this morning to this court, and he did come back, so that he had for himself, time to see his family and get home and get cleaned up, between about 6:00 o'clock last night and 11:00 o'clock this morning when he finds himself propelled again into a repetition of the proceedings as a result of which he was, according to Judge Denman's ruling, improperly committed without a stay for over a week.

Now we say to require under those circumstances this witness to continue with a legal proceeding at 5:10 at night—and that is the time, it is now 5:10—

The Court: 5:11.

Mr. Margolis: 5:11, your Honor. We are satisfied with 5:10—to have him come in and continue after normal court hours and to order his attorneys

who have been involved in the manner that I have indicated all day and all of these previous days, without any real opportunity to consult with him or to prepare on this matter, is not only unjust but is a denial of due process.

After your Honor rules on this question I want to make another motion if this motion is denied.

The Court: The motion is denied. We will proceed.

Mr. Margolis: I want to now make a motion that this [106] entire matter be continued either for a date certain several months from now, two or three months from now, or until the Circuit Court has ruled in the appeal now pending before it in the matter of Philip Bock, which I believe is No. 8787-PH—if that number is wrong my associate will correct me—on the ground that this proceeding raises identical questions of fact and of law as are presented in the other case. Even though the questions put to the witness are different, there is no material difference as far as the questions of law raised are concerned, and that therefore to continue with these proceedings is simply a method of harassing this witness and is a method of defeating the appeal, the right of this witness to appeal, by during the period of appeal making him constantly subject himself to the exact type or procedure which is being tested on the appeal.

It seems to me, your Honor, that to require him to go ahead at this time is indirectly to defeat the appeal itself, and I submit—

The Court: I do not think that the appeal can be

treated as a dismissal of the grand jury, nor do I think that the appeal, or the mandate from the Circuit Court, was broad enough to prevent the grand jury from conducting their investigation. It was limited to the questions that were there before the court. This is limited to the questions that are here. My first function and duty is to make a determination [107] on the motions before me as to whether or not these questions will incriminate or tend to incriminate this witness in connection with the proceedings before the grand jury, or at all.

Mr. Margolis: May I add that I know that it is customary when identical questions are pending on appeal and are to be decided within a reasonable period of time, or is to be anticipated that they are to be decided within a reasonable period of time, and when no useful purpose can be served by going ahead with proceedings of this kind that it is customary, and very frequently done, that cases are continued.

It seems to me that here, where this witness has made his position clear, he has claimed the right against self-incrimination, of questions which place him in the identical position which these questions do, if this proceeding is allowed to continue then, your Honor, a farce could be made out of this witness' rights to appeal. What is to stop the grand jury, if this is allowed, after these questions are asked and we go through all this——

The Court: I have not gotten to that. I cannot indulge in any imaginative proceedings. I do not

know what the grand jury is going to do. All I am concerned with is what is here.

Have you stated the grounds of your motion, counsel?

Mr. Margolis: I have stated them. I just want to add one or two sentences on the point and I will be finished. [108]

Your Honor says that he doesn't know what this witness' position is, but the fact is that your Honor knows this witness' position from what he has done in proceedings raising identical issues, and I don't think that this court or any of us should blind ourselves to the actual facts that are right in front of our eyes on any technicality.

The Court: I do not intend to, nor do I intend to be misled into it by anybody.

The motion is denied.

Do you have anything else?

Mr. Margolis: Yes, I have certain other things.

I think first of all we would like to offer——

The Court: Do you wish that everything that was offered in opposition to the motion of the government or in objection, all matters and things on behalf of the previous witness Doran, shall be admitted or shall be deemed to have been offered here to the same force and effect——

Mr. Margolis: As though they were being offered on behalf of this witness.

The Court:——as though they were being offered on behalf of this witness, and all other arguments and reasons offered in support thereof?

Mr. Margolis: Yes, your Honor. This is not to

preclude us from presenting additional matters though.

The Court: No. It will be so ordered. Everything is [109] in this proceeding now on behalf of this witness that was in the proceeding on behalf of the witness Doran. [110]

* * * *

Mr. Margolis: Upon the basis of that, your Honor, we say that the entire record in the Philip Bock case should be made a part of this record. I don't know whether this copy that we have here is a certified copy, but I think if the reporter is here it can probably be established through him.

The Court: I can take judicial notice of it.

Mr. Margolis: It is another proceeding. I am not sure whether your Honor can.

The Court: I can take judicial notice of my own records and proceedings, and so can the Circuit Court.

Mr. Margolis: In other words, we are offering this—pardon me.

(Conference between counsel.)

Mr. Margolis: Mr. McTernan directed my attention to the fact that the difference between what I am doing now and what was ordered before by the court may be made a little clearer.

The Court: I understand it perfectly.

Mr. Margolis: Before that we merely repeated the arguments. Now I want to argue the record of what happened before as evidence of what happened before.

The Court: I understand. I can take judicial

notice of [112] the proceedings and records and files.

Mr. Margolis: Very well, your Honor. [113]

* * * *

Mr. Carter: The government will stipulate that Mr. Bock was incarcerated from the time of your Honor's order until yesterday, and after bond was approved—I don't have the exact hour of his release—but some were released at 4:00 o'clock and some by 5:00 o'clock, so it was between 4:00 and 5:00 o'clock yesterday; and we will also stipulate that the marshal was instructed to serve him with a subpoena upon his release for the reason that it had been very difficult to serve these witnesses and keep them under the jurisdiction of the subpoena.

Mr. Margolis: I will accept that.

The Court: That the marshal was instructed to serve and he was served immediately upon his release?

Mr. Carter: Yes.

Mr. Margolis: Up to that point I accept the stipulation. [115]

* * * *

Mr. Margolis: We have a statement we have made previously with respect to the lack of preparation. We have nothing further to offer except I understand the witness is willing to make a statement to your Honor.

The Court: Does he request it?

Mr. Bock: Yes, sir.

The Court: Do you request the opportunity to make a statement?

Mr. Bock: Yes, sir.

The Court: Very well. The reporter, the Clerk and the bailiff will come in chambers.

STATEMENT OF WITNESS PHILIP BOCK

(The following proceedings were had in chambers, as follows:)

The Court: You heard your counsel's statement. Do you desire to make some additional statement other than what he has said?

Mr. Bock: Yes, I do.

The Court: I see that you have a paper there. You have written out—— [116]

Mr. Bock: Well, I consulted with them and——

The Court: Consulted with your lawyer, you mean?

Mr. Bock: Yes—and there are a number of points I wanted to note so I would be sure of what I was saying.

I have read in the papers and I am aware of the fact by that means that both Dorothy Healey and Ned Sparks are officers of the Communist Party in Los Angeles.

The Court: You mean you are aware of it from having read it in the papers only?

Mr. Bock: I read it in the papers and I am aware of it.

The Court: In addition to the knowledge you got from the papers?

Mr. Bock: I have to refuse to answer that question on the grounds it might tend to incriminate me.

The Court: Very well.

Mr. Bock: I am also aware of the fact that reading the newspapers that national leaders, or alleged national leaders of the Communist Party——

The Court: By the way, the order is that this is secret and confidential and will remain so and not be transcribed or disclosed unless and until you consent to it or request it, either by yourself or through your counsel, so you can feel at perfect liberty to say whatever you desire.

Mr. Bock: Well, I might want it to be part of the record without in any way incriminating myself. [117]

The Court: That is up to you.

Mr. Bock: Yes, sir.

The Court: I am just telling you that in order that you may feel free to say whatever you desire to say to me.

Mr. Bock: Well, as I was saying, I did read in the newspapers about the indictment of leaders of the Communist Party, in fact, I have read the indictment myself, and I discussed these indictments with my attorneys.

Furthermore, I am aware of the fact, from reading the newspapers, that the Attorney General was said to be planning similar indictments as these indictments in the Federal Court in New York for people in Los Angeles and other cities throughout the country.

I am also aware of the fact that through reading the newspapers that the Attorney General has found under the loyalty order that the Communist

Party is an organization which advocates the overthrow of the government by force and violence.

I am also aware of the fact, been informed of it, that deportation proceedings against certain people, aliens, have been undertaken solely because of the fact that they are members of the Communist Party.

The Court: Does that concern you particularly? You are a native-born citizen, I take it?

Mr. Bock: Yes. Well, I believe—— [118]

The Court: Do you have a feeling that you as a native-born citizen will be deported?

Mr. Bock: No, but I do have the feeling——

The Court: That others will be?

Mr. Bock: ——that the Attorney General holds that there is something criminal in being a member of the Communist Party, that if it is grounds enough to expel an alien there must be something criminal involved in it.

The Court: There is no law permitting banishment.

Mr. Bock: Nevertheless I am aware that deportation proceedings have been held.

The Court: That is one of your grounds for refusing to answer, deportation?

Mr. Bock: Yes.

I have also read that in regard to the investigations that may follow and are planned to follow in other cities, including Los Angeles, investigations which might lead to similar indictments to the indictments handed down against the Communist leaders in New York, that the expression is used that they would go from top to bottom in the Communist

Party, that impliedly nobody would be immune from this who had some connection with the Communist Party, and I fear to answer the questions which were put to me——

The Court: Do I understand by that that you do have some connection with the Communist Party?

Mr. Bock: I refuse to answer that question on the grounds that it might tend to incriminate me.

The Court: I did not quite understand your answer.

Mr. Reporter, would you read back the latter portion of his answer.

(The record referred to was read by the reporter as set forth above.)

The Court: That is what you mean, nobody would be immune who had some connection. Am I to understand that you do have some connection?

Mr. Bock: I refuse to answer that question, your Honor, on the grounds——

The Court: All right. It is your statement.

Mr. Bock:——that admission or denial of anything might incriminate me.

The Court: I just wanted to understand fully your statement, Mr. Bock.

Mr. Bock: In regard to the questions which were put to me before the grand jury, I fear to answer those questions, some of them, on the grounds that they might tend to connect me with certain individuals who might be members of the Communist Party, or that even if the question itself didn't tie me up directly with anybody, that once I began to

answer one question it would lead to another along the same line, that I might be led to answer questions which might tend to incriminate [120] me by showing that I might have some membership or affiliation in the Communist Party. And that I fear that this might incriminate me because I know that other people alleged to be Communists are now under indictment and are being prosecuted in accordance with the plans of the Attorney General.

This is the basis for which I fear to incriminate myself.

The Court: Do you have any other reasons?

Mr. Bock: I couldn't make any other statement.

The Court: Or anything that is purely private and personal to you in connection with these questions? In other words, there may be something that you do not want to tell your lawyer. I have in mind the question, do you know Dorothy Healey.

Mr. Bock: I have the utmost confidence in my lawyers and I don't have anything else to say at this time.

The Court: Nothing else at all?

Mr. Bock: No, sir.

The Court: Very well. We will convene again in the courtroom. [121]

* * * *

The Court: I have heard Mr. Bock's statement in chambers—incidentally I ordered, not only as to his statement but as to the previous witness' statement, that they remain private and confidential and secret unless and until they are requested either by the witness or counsel.

The witness has stated his reasons, some of them in addition to those that are urged by counsel, but I cannot see anything in them which would tend to show that answering the questions which are now pending would incriminate or tend to incriminate, and for that reason I must order the witness to answer the questions.

It will therefore be the order of the court that the witness Philip Bock is ordered and directed to answer the following questions:

Do you know Dorothy Healey?

Do you know the business and home address or home address of Dorothy Healey?

Do you know the occupation of Dorothy Healey?

He answered the question, do you know where Dorothy Healey is located, if I remember the record correctly, is that not correct? He said no, he did not.

Mr. Carter: That is correct.

Mr. McTernan: Not according to my notes.

Mr. Carter: That is correct. He said he didn't know [122] where she could be found or located.

The Court: That is my recollection, that he said he did not know where she could be located or found.

The fourth one is: Do you know whether or not Dorothy Healey is married?

The fifth one: Do you know her husband's name?

The sixth one: Do you know his occupation?

And the seventh one: What is his occupation?

Do you understand the order, Mr. Bock?

Mr. Bock: Yes, sir. [123]

Los Angeles, California

November 12, 1948—10:00 a.m.

The Court: Ben Dobbs? Is he present?

Mr. Dobbs: Present.

The Court: Mr. Kasinowitz?

Mr. Kasinowitz: Present.

The Court: And Henry Steinberg?

Mr. Steinberg: Present.

The Court: Very well.

Mr. Goldschein: Miss Frances Duffy, please.

FRANCES L. DUFFY,

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, please?

The Witness: Frances L. Duffy.

The Clerk: Take the stand, please.

Direct Examination

By Mr. Goldschein:

Q. You are Miss Frances L. Duffy, are you not? A. I am.

Q. You were the official court reporter before the grand jury of this court on November 3, 1948?

A. Yes, sir.

Q. Were you present when the witness Ben Dobbs appeared in the grand jury room?

A. I was; yes, sir.

Q. Mr. Dobbs I believe at that time was recalled, was he not? A. Yes, sir.

Q. Did you take down in shorthand accurately the questions that were propounded to him and the answers he gave? A. I did.

(Testimony of Frances L. Duffy.)

Q. Now, Miss Duffy, will you please read those questions and answers?

A. Mr. Dobbs was recalled twice, Mr. Goldscheine, on that date. Do you want both times?

Q. Yes. And will you begin with the beginning, please. A. Yes, sir.

When Mr. Dobbs was brought in the first time these were the questions:

“Mr. Goldscheine: Mr. Dobbs, we are not investigating you. The grand jury is making an investigation with reference to certain Federal employees who have made false statements with reference to their affiliation with certain clubs, organizations or groups of people.

“Q. (By Mr. Goldscheine): Now, you never have been employed by the Federal government, have you?

“A. I have just been out of jail about five minutes, and I just spent ten days in jail, and, since this jail sentence, I think I ought to have the right to speak to my attorney about the rest of these procedures.

“Q. You mean there is some question with reference to whether you are a Federal employee that you want to consult your attorney about?

“A. There is some question about getting myself settled, after ten days in jail. There is no question about what you refer to generally or specifically, but there is some question about getting myself settled.

“Mr. Goldscheine: All right, we will recess you

(Testimony of Frances L. Duffy.)

five minutes. Your attorney is outside. Will you go out and ask him that question, and return here."

Then Mr. Dobbs returned and these were the questions and answers that were asked and given:

"Q. (By Mr. Goldschein): Did you talk to your counsel, Mr. Bock?

"A. I did. Dobbs is my name.

"Q. That is right; I am sorry. Mr. Bock just left here. Mr. Ben Dobbs, recalled.

"Now, Mr. Dobbs, are you employed by the Federal government? [140]

"A. At the present time?

"Q. Yes, sir. A. I am not.

"Q. Were you ever employed as a civilian by the government? A. I was not.

"Q. To the best of your recollection, are you personally acquainted with any employee of the Federal government? A. I am not.

"Q. Do you recall the names of acquaintances that you may have that are employed by the Federal government?

"A. I said that, to my knowledge, I am not acquainted with anybody that is employed by the Federal government.

"Q. Do you know Dorothy Healey?

"A. I refuse to answer that question on the grounds that it may incriminate me.

"Q. Do you know her business or home address?

"A. I refuse to answer that question on the ground that it may incriminate me.

(Testimony of Frances L. Duffy.)

“Q. Do you know her occupation?”

“A. I refuse to answer that question on the same grounds.

“Q. Do you know where she can be located?”

“A. I do not.

“Q. Do you know whether Dorothy Healey is married? If so, what is her husband’s name?”

“A. I refuse to answer that question on the ground that it may incriminate me.

“Q. Do you know what her husband’s occupation is, if she is married?”

“A. I refuse to answer that question on the grounds that it may incriminate me.

“Mr. Goldschein: All right, sir, we will recess you until tomorrow at 11:00 o’clock, Mr. Dobbs.”

Mr. Goldschein: Now, may it please the court, we are challenging that claim to self-incrimination, insisting that the witness has no privilege of self-incrimination and suggest respectfully that the court hear the witness, if he so requests, privately in chambers so that the court can determine whether or not the answers to those questions would tend to incriminate the witness for the violation of a Federal offense.

The Court: Very well.

Mr. Margolis: May we first have read back, your Honor, the questions which were asked and which the witness refused to answer after the question “Do you know her occupation.” May we have the reporter read that back?

(Testimony of Frances L. Duffy.)

The Court: It begins with "Do you know Dorothy Healey?"

Mr. Margolis: I have the first three, your Honor.

The Court: Very well.

"Do you know Dorothy Healey?"

"Do you know her business or home address?"

"Do you know her occupation?"

Mr. Margolis: I have those.

The Court: "Do you know where she can be located?" Is that the one you want to begin with?

Mr. Margolis: I want all from there on.

The Court: After "Do you know her occupation?"

Mr. Margolis: Yes.

(The record referred to was read by the reporter as follows:

("Q. Do you know where she can be located?

("A. I do not.

("Q. Do you know whether Dorothy Healey is married? If so, what is her husband's name?

("A. I refuse to answer that question on the ground that it may incriminate me.

("Q. Do you know what her husband's occupation is, if she is married?

("A. I refuse to answer that question on the grounds that it may incriminate me.")

Mr. Margolis: Your Honor please, on November 4, 1948, there were certain proceedings before your

Honor in re Lillian Adele Doran, No. 8796-PH and Philip Bock, No. 8827-PH.

Time can be saved if the court were to consider as having been offered on behalf of Mr. Ben Dobbs in these proceedings all of the evidence, offers of proof, exhibits and other matters—

The Court: And things?

Mr. Margolis: —other matters and things contained in those records.

The Court: That is, that were offered on behalf of Lillian Adele Doran and Philip Bock or either of them in opposition to the motion of the government?

Mr. Margolis: As though they were being offered today for the first time on behalf of Ben Dobbs.

Mr. Goldschein: May it please the court, on that occasion counsel for these witnesses didn't have an opportunity to bring those affidavits, papers, records and other things that they were going to bring in here and so we stipulated to save the time of the court and everybody else. At this time we think they have had ample time to bring those affidavits in. It is now four weeks, and we would like to see some of those affidavits that they intend to offer, or offers of proof that they are going to make by affidavit.

Mr. Margolis: If your Honor please, the reason we haven't [144] done that—

The Court: That is up to them. If they want to stand on their record, they can.

Mr. Goldschein: We are not stipulating.

The Court: He is not asking you to stipulate. He is asking me for an order.

Mr. Goldschein: I am sorry.

Mr. Margolis: I might state this, your Honor, that

your Honor ruled out all of these matters as immaterial and if counsel's position is that we have to put a witness on the stand and ask the witness the questions in order to make the offer of proof, why we shall proceed to do so, but we have—

The Court: Counsel's statement was made under a misapprehension that you were asking him for a stipulation. I think that matter is now cleared up. You are asking me for an order?

Mr. Margolis: Yes.

The Court: To the effect that all of the things that you have mentioned may be deemed to have been put in evidence and the record here as grounds of opposition and objection to the motion of the government with the same force and effect as if they were in *haec verba* produced at this time and now on behalf of this witness and in opposition to the present motion of the government for an order directing this witness to answer the questions.

Mr. Margolis: The only problem that that presents, your [145] Honor, in view of counsel's statement, is this: Ordinarily before an offer of proof is made the proper method of procedure is to put a witness on the stand, to ask him an appropriate question or series of questions, to have the objections to those questions sustained, and then to make an offer of proof.

Now that procedure was not followed in the other matters because there wasn't time to get the witnesses. We did not produce the witnesses today for two reasons: One was that this procedure of incorporating the record has been followed in a number of instances without objection and, second, we saw

no useful purpose to be served by producing witnesses, to have them sit on the stand and asked questions as to matters which the court had already ruled were immaterial, and when we knew the rulings were going to be the same.

However, in view of counsel's position we again want to ask for time. We have been misled. We want to ask for time to produce those witnesses and we are prepared to establish each and every one of the matters on which we offered proof, but we have been misled by counsel's acquiescence to this type of procedure in the past. We don't want this record to go off on the basis of a technicality. Counsel apparently doesn't have enough confidence in the substantive points and therefore is trying to get us in the corner here on a technicality. I want to say to this court that we are prepared to prove [146] everything that we have said, but we have proceeded in this manner simply because this is the manner in which other cases have gone ahead and we anticipated that prior proceedings would be followed here. We anticipated that counsel was not going to raise this sort of a technical situation in a situation where the court had already ruled that these matters concerning which we are prepared to submit direct evidence were immaterial.

We again therefore request your Honor for time in which to produce those witnesses on the basis of counsel's technical assertions here and putting us on our proof with respect to these matters.

The Court: The motion for a continuance is denied. The order of the court will be to the effect as I have just previously stated, and in addition to that

all of the objections made on behalf of the government in connection with these matters and things and evidence and offers of proof that were made on behalf of the witnesses will be incorporated and deemed to be a part of the record with the same force and effect as if they were again repeated here, so that your whole record is the same on both sides with relation to this witness as with the two previous witnesses.

Mr. Margolis: Do I understand that counsel in effect has objected to the admissibility—

Mr. Goldschein: In view of the court's statement, we [147] withdraw our objection.

The Court: You are withdrawing your objection?

Mr. Goldschein: I am withdrawing our objection in view of the court's statement.

The Court: The objections you made heretofore?

Mr. Goldschein: Yes.

The Court: Let us get the record clear. Are you withdrawing the objections you made to the offers of evidence and statements of proof that were offered on behalf of the others, or are you—

Mr. Goldschein: No.

The Court: What objection are you withdrawing?

Mr. Goldschein: The objection previously made this morning with reference to demanding proof and not making any stipulation that had previously been made in the other cases.

The Court: Very well. I think, Mr. Margolis, that that clarifies it.

Mr. Margolis: That clarifies it.

The Court: The objection made this morning to the motion of Mr. Margolis to make the record of

other cases the record in this case is overruled in any event, and the order made will stand.

Now does the witness wish to make a statement privately to the judge in chambers under the same circumstances as the previous witnesses?

Mr. Margolis: We would like an opportunity to consult with him with respect to that matter, but we have some additional argument to make to your Honor on these points.

The Court: Very well.

* * * *

Mr. Margolis: In other words, the effect of the granting of the stay is this, that it is a ruling that this witness has a right to have these questions tested on appeal and may not be required in the meantime to answer these questions, because to require him, or to use coercion upon him, to require him in the meantime to answer these questions is to effectively deprive him of the right of appeal because if he is coerced pending the appeal into answering the questions which are the subject matter of the appeal, the appeal becomes moot.

The Court: Mr. Margolis, you urged that same thing in relation to the witness Bock the other evening.

Mr. Margolis: This is preliminary to citing some authorities, your Honor, and I ask the court's indulgence to be permitted to spell this argument out.

The Court: If you have new matters, let us get to them, but let us not hash over the same things.

Mr. Margolis: This is a necessary foundation

for my argument, your Honor, because in order to make this point crystal clear to the court, if I can——

The Court: I understand it.

Mr. Margolis: Very well. I will try to avoid repetition. But it is not possible when one goes on which an argument to always completely avoid it.

* * * *

The Court: Before proceeding in the matter with relation to the first ten proceedings (the numbers of which I have forgotten), I made an order that the statements made to the judge in chambers will be private until released by the witness or their counsel. The reporter advises me that he is in receipt of a letter from Mr. Margolis requesting that the transcript of the first ten proceedings be transcribed. I authorized the reporter accordingly to transcribe them and deliver them and place a copy in the official files and proceedings so that they are now public, relying upon the authority of counsel.

The reporter advises me that he is now in receipt of another letter, dated November 12, with relation to the proceedings concerning Lillian Adele Doran, No. 8976-PH, and Philip Bock, No. 8827-PH, requesting that copies be prepared. This is signed by Mr. McTernan.

Accordingly, I will hand this to the Clerk for ling and direct that a photostat be placed in the other file, and authorize the reporter to transcribe the proceedings on the basis that that is the release of the privacy by the witnesses.

Mr. Margolis: Those facts as stated by your Honor are correct.

* * * *

Mr. McTernan: The next case is *In Re Walsh*, 104 F. 518. This is also a District Court opinion, your Honor.

The case arose on a certificate and order to show cause for a referee in bankruptcy. The bankrupt had refused to identify his signature on statements made over his name to a third party, claiming his privilege against self-incrimination.

Here the court, on the basis of the Counselman case, held that the privilege was properly claimed, saying:

“The question asked might certainly tend to incriminate the witness if the statement made to the third party were false and the third party relied on it in furnishing the goods in question. Then Walsh would be guilty of obtaining property under false pretenses.”

Now here again, your Honor, the court is simply looking at the situation in the light of the facts which exist and the possibilities of prosecution that exist in the state of the law without any details showing the facts, without requiring the bankrupt to make admissions of participation in any kind of a fraudulent scheme, and simply saying that on the possibility that this statement which he was asked to identify contained false statements he would then be guilty of a crime of obtaining goods under false pretenses, or might be prosecuted for such a crime.

The Court: His name appeared on the document and it was in writing, so the question is whether or not it was his signature. If the name appears in writing the presumption is that the man signed it. So obviously I cannot see any analogy there.

Neither can I in the particular case which I just examined, because there it was a proceeding under a court-martial and there was a closer connection between the defendant in that case and the publication which appeared than the mere asking of the question.

Go ahead, counsel.

Mr. McTernan: I submit to your Honor that if the government wanted to prove that this was Walsh's signature and they asked him for information and he claimed his privilege, then the approach of the court is pertinent here and is applicable here. We are not governed, nor is the court governed, by what questions the government need not ask.

The Court: That would be analogous if they had a third person in and said, "Do you know whether or not that is Walsh's signature?" Then you would have an analogy with this case.

Mr. McTernan: Obviously we are not going to find a whole series of cases which are on all fours with this case.

The Court: No, I do not think you are going to find any analogies. I have looked at the books myself and I cannot find any analogy where anybody has ever attempted to claim immunity on the basis of the questions that are asked here or on the basis of this immunity.

Mr. McTernan: What we are trying to show to the court and will if we are given the opportunity is that the courts are extremely liberal in assessing the claim of the privilege against self-incrimination and they do not require the witness claiming the privilege to spell out in every detail how the incrimination would occur, because by doing so the witness would be giving up the very thing he is claiming.

The Court: Nor can it be left to mere imagination as to what the answer might be. There must be some reasonable relationship between a possible crime which the witness might have committed and the answer that he might give to the question, a reasonable answer to the question, and I have been unable to see it as yet. I have followed your argument very closely and I still cannot see it.

Mr. Margolis: The crime, your Honor, as spelled out by the gentlemen who sit at the other table——

The Court: We have gone over that before, under the Smith Act with relation to the Foster indictment, and I have studied the matter over very carefully and I cannot see any reason for changing my views as heretofore expressed.

Mr. McTernan: I would like an opportunity to finish with these cases, your Honor.

The Court: Particularly in view of the fact that in each one of these cases they have stated to each one of these witnesses that they are not under investigation.

Mr. McTernan: But, your Honor, that has nothing to do with the question. The point is that in

any proceeding the government cannot compel an answer which could be used in some other situation to involve him in prosecution, and it doesn't make any difference whether these people are under investigation or not under investigation. The witness in the Counselman case was not under investigation.

The Court: I think it would in the event that these witnesses were ultimately indicted for some offense.

Mr. McTernan: It might make a stronger case.

The Court: Then certainly who would be the first one here to claim that they had immunity?

Mr. McTernan: We have stated our position to the court on immunity. We say that there is no law applicable to this situation by which directly or indirectly any possibility of immunity could be claimed or given, and it is significant that at no time in any of these proceedings beginning with October 25th has government counsel claimed that there was any basis upon which these witnesses could be given immunity.

The Court: I do not mean to be expressing any final opinion as to whether the statement made by the prosecutor to these witnesses did or did not grant immunity; but on the general subject of immunity I have heretofore expressed myself, and that it lies in the constitutional right. I do not think it lies necessarily or solely or exclusively by statute. That is the effect of the Supreme Court's holding in relation to those southern cases, the names of which I have forgotten now, where a

man gave a confession under circumstances which the court held was improper and the confession was used to convict him.

Mr. Goldschein: The McNabb case.

The Court: You are all familiar with the cases that I have in mind.

But the court says you cannot do that. So the net result is he cannot do it because the man cannot be forced to testify against himself. In other words, he cannot get a confession out of him and then prosecute him or use it against him. So if that is not constitutional immunity, I do not know what it is.

Mr. McTernan: I wish you would weigh that against the issues involved in the Counselman case, where the question is whether he could be forced to testify against himself and whether an immunity statute was sufficient, and they held that the immunity statute was not sufficient because it wasn't broad enough.

The Court: Yes. There are several statutes relating to particular types of offenses where they give immunity. I recall, I think during the NRA days, the National Industrial Recovery Act, had some provision in it, if I remember correctly, where a person would be specifically granted immunity if he came forward with certain information from the antitrust laws. But that is a different situation, that is a statutory immunity, and granted with relation to the attainment of a particular object of Congress.

You would have a similar situation here if Con-

gress had passed some general act condemning the Communist Party or anything that it stands for, or the Communist Party by name, and said that anyone who comes forward to give information will be granted immunity. But you do not have that here.

* * * *

Mr. McTernan: But going on with the question of the approach of the courts to the question of the claim of privilege, the next case I want to cite is *Ex Parte Irvine*, 74 F. 954, where in a criminal case—a criminal trial, not a grand jury proceeding—there had been testimony as to the participation by three individuals whom we shall call A, B and C in a lottery business in certain cities in Ohio and Kentucky; that they employed carriers to transport bets and money between these cities.

The witness was asked at the trial whether during the period in question A, B and C were not engaged in and connected with the lottery, and what the duties of one of these three people were, and whether one of these three people was a carrier of bets and money between the two points. And they held that the claim of privilege against self-incrimination there was proper, saying that the answers would tend to incriminate since admissions by the witness as to what the business of A, B and C was would be relevant to establish that A, B and C were engaged in business at the time in question and that this would be a material link in the chain of evidence to establish the possible guilt of the witness on a charge of conspiracy to violate the very laws that were involved in that case.

Now this, I submit, on its facts becomes very close to the situation here. Here in this case, too, a witness is being asked what he knew about somebody else, and this he refused to answer on the ground that to reveal his knowledge might incriminate him on the very charges in which these people were involved.

I cite this particularly, your Honor, because your Honor expressed concern over the question.

The Court: What is the citation?

Mr. McTernan: 74 F. 954.

The Court: In this case the witness was called during the course of the trial before the trial jury.

Mr. McTernan: Yes, that is what I indicated.

The Court: And prior to the time he was called to the witness stand there was previous evidence that the witness had actually carried the lottery packages back and forth, so that there was evidence before the court from which the court could reasonably and readily conclude, in view of the previous testimony of a witness under oath, that this witness here had participated in the lottery, that if he would answer the question and admit that he knew them, and also admit that he carried packages, it would incriminate him.

Mr. McTernan: But your Honor doesn't mean, does he, that in every case where the witness claims the privilege he first has to testify under oath that he has committed the crime?

The Court: I did not say that.

Mr. McTernan: That is the purport of your statement.

The Court: I did not say that and there was no implication to that effect. I said, what had occurred there was before this witness was called upon to testify another witness had testified under oath that he actually had committed an offense, so the court had before it something more than some mere claim, some possible idea that a person might, by saying that they knew someone or know their address, be incriminated. I just cannot see any analogy to this case, counsel.

* * * *

Mr. McTernan: And the question which your Honor has to decide is very similar to the problems that were put before Lord Coke at the time the star chamber was conducting inquisitions similar to the ones this grand jury is in, and similar to the cases that were presented before the Colonial courts before the Revolution.

The Court: I have seen no similarity between the grand jury proceedings and the star chamber session as yet.

Mr. McTernan: I have, your Honor, and I would be glad to elucidate.

The Court: In these grand jury proceedings the questions are, "Do you know." The witnesses have had an opportunity to be heard and up to now I have decided that their answers will not incriminate them.

Mr. McTernan: We have tried to show to this court that this grand jury, through the admissions of the United States Attorney for this District, is

engaged in an investigation of Communist activities from "top-to-bottom," looking to any possible violations of law by people with whose political philosophy the United States Attorney disagrees. And we say that a case which arises out of an inquisition like this, your Honor, is very closely similar to the inquisition of the star chamber and very similar to the writs of assistance used by the Colonial governors against American patriots in the Colonial days. We say here the responsibility of the court is the same as the responsibility of Lord Coke. It is the same as the responsibility of the United States Supreme Court in recognizing this vicious practice in cases such as *Anderson v. United States*, where this kind of prosecution against Anderson was reviewed by Mr. Justice Black, and we hope that the real nature of these proceedings will be recognized by everyone who has the opportunity to know about them, your Honor, and particularly this court, so that the right of people in this community to be free in their political beliefs and not subjected to a "top-to-bottom" investigation at the whim of the United States Attorney who disagrees with their political philosophy, that this kind of thing will be ended and that this kind of hyper-technicality of asking questions as remote as the United States Attorney can frame them from the actual issues as to what he is going after can be used to put people in jail, not because they refuse to answer questions, your Honor—that is not the purpose of the United States Attorney: the purpose of the United States

Attorney is to put these people in jail for what he thinks they think, and that is the only reason.

* * * *

Los Angeles, California

November 12, 1948; 1:30 o'Clock P.M.

* * * *

Mr. Goldschein: May it please the court, we have heard much in these past few weeks about what the Attorney General did and about what the Attorney General said, and the fact that the Communist Party was listed as a subversive organization. Nothing was said about the other organizations that were listed as subversive. The only complaint was that the Communist Party was on that subversive list.

Now let me call the court's attention to the fact that since it had already been touched on I would like to point out that the German Bund was also on that subversive list of the Attorney General, the Dante Alighieri Society was also on that subversive list of the Attorney General; so were the Friends of New Germany on that subversive list of the Attorney General. The Lictor Society was a Fascist organization on that list, and the German-American Vocational League was also on that list.

So the Attorney General didn't merely single out and select the Communist Party as a subversive organization. He named all those that he thought were organized or had interests that were adverse to the government of the United States. But he said nothing, and Congress has enacted no laws, which made any of those organizations illegal.

Now it is our position in this case, may it please the court, that neither the Communist Party nor any member of that party, nor any associates of the members of that party, are entitled to any greater privilege than any other citizen of the United States; that every citizen who is subpoenaed before this grand jury must answer questions propounded to them unless they can show to the court that the answer to those questions would tend to incriminate them for the violation of a Federal offense.

That was determined for the first time, may it please the court, under the administration of President Jefferson when the war for civil rights had just been concluded and when Chief Justice Marshall rendered his famous decision in the Aaron Burr case on that very question of contempt. No witness can decide for himself whether or not the question propounded to him would tend to incriminate him for the violation of a Federal offense. He can determine that he will not answer when the court orders him and then when he determines that it is at his peril.

Were the law otherwise than that the member of any organization, whether it be a totalitarian organization, whether it be a Fascist organization, whether it be a Communist organization, if the newspapers published a story with reference to a grand jury investigation as to any one of those organizations every member of that organization and every individual who had ever been associated with any member of that organization, if sub-

poenaed before the grand jury with reference to any material fact, could claim their privilege against self-incrimination because they had at one time been associated with a member of that organization.

And it goes further. It wouldn't alone pertain to social organizations or political organizations, but it would also pertain to gangs and mobs.

Let us say for the sake of illustration that the newspapers today published a story with reference to a man being found dead in a ditch allegedly killed by a member of the Capone organization. Could it be possibly held that every member of that Capone organization who is subpoenaed in before that grand jury, whether he knew anything directly about that killing or not, or had anything to do with it, could claim his constitutional privilege against self-incrimination because he was associated with that organization or was associated with a member of that organization?

The president of a corporation is not privileged to claim his privilege against self-incrimination when subpoenaed to bring the books of that corporation in before the grand jury. An official of a labor union has no privilege against self-incrimination when ordered to bring the books of that labor union in before the grand jury. Why then are members or associates of members of the Communist Party claiming any special privilege? By virtue of what right? Are they especially annointed? What greater privilege are they en-

titled to than I would be, or any other citizen of these United States would be?

We insist, may it please the court, that the first case decided in this country by Chief Justice Marshall and the last case decided by the Supreme Court of the United States on this question, all cases in between hold to the same thing. In the case of *Camorota v. United States*, may it please the court, 111 F. (2d), *United States v. Flegenheimer*, 82 F. (2d), *United States v. Winberg*, 62 F. (2d), *O'Connell v. United States*, 40 F. (2d)—in each of those except the *Camaroto* case the question was raised, do you know a certain individual.

In the *Flegenheimer* case the question was asked, "Do you know *Di Larmi*," and *Di Larmi* was an alias for *Flegenheimer*. He refused to answer that question and the court held in that case that there was no privilege against self-incrimination involved there because his knowledge of *Flegenheimer* or *Di Larmi* couldn't possibly incriminate him although he had a bank account with him.

In the *O'Connell* case the question was, "Do you know where *Malloy's* place is," and he refused to answer that question. It was a lottery investigation by the grand jury. And in that case the court held that he was not privileged to refuse to answer that question.

I can call off case after case on that question, may it please the court, but it proves nothing and enlightens the court no more than did the original case in the Supreme Court, the *Aaron Burr* case,

and the Mason case. They are all on the same point. And in the Mason case there is no need of me going into the facts of that case because the court has already heard them discussed and discussed them during the course of this argument.

The Court: The questions of law that have been raised do not seem to me to throw any different light upon the situation than that heretofore done. I can see no reason for reaching any different conclusion than I have heretofore reached concerning the question, nor extending myself at length on the points that have been raised by counsel or the cases that have been cited. As I stated to Mr. McTernan, the question is whether or not these questions will incriminate the witnesses.

I must say that in so far as the appeal is concerned, of course the parties have a right to an appeal, but it is not in every case that a man is released during the appeal. Very frequently people take appeals and serve their term out in the penitentiary and their cases are either affirmed or reversed after the appeal is decided. Because a man has a right to take an appeal does not mean he has a right to thwart the processes of the court or the orders of the court pending the appeal. So much for that.

If the witness desires to make a statement to me privately to me in chambers, he may do so under the conditions heretofore indicated. This is the witness Dobbs. Have you reached a conclusion in that respect?

Mr. Margolis: Yes. We merely want to answer

Mr. Goldschein, but in view of your Honor's remarks perhaps it won't serve any useful purpose.

The Court: Do you desire, Mr. Dobbs, to make a statement privately in chambers to the judge?

Mr. Dobbs: Yes, sir.

The Court: Very well. The reporter and the Clerk and the bailiff will come into chambers.

STATEMENT OF WITNESS DOBBS

(The following proceedings were had in chambers, as follows:)

The Court: Yes, Mr. Dobbs. You wish to make a statement at this time?

Mr. Dobbs: That is right, sir.

The Court: Have you written it out and you wish to read it?

Mr. Dobbs: No. I have just made a few notes.

The Court: Very well.

Mr. Dobbs: In view of the fact that there have been many newspaper articles of recent date stressing the point or emphasizing that the government is going to conduct a full-scale investigation of Communist activities, and in the publicity relative to the indictment of the 12 Communist leaders, or alleged Communist leaders, that come up, I believe, next Monday for trial, and in view of the fact that the government takes the position that aliens who may be members of the Communist Party are subject to deportation proceedings because of the government's contention that Communists are advocates of force and violence against the government, and in view also of the whole

spreading thesis through various committees of the guilt-through-association theory, that I still maintain the position that I refuse to answer questions about Communist organizations, alleged Communist Party members, in the view that the answers to these questions might incriminate me.

For instance, I have read that Mr. Sparks and Mrs. Healey are leaders in the Communist Party and if I answer these questions relative to these people, or any knowledge I may have of these people, that I am afraid that my answers might tend to link me to the Communist Party and that these answers before the grand jury might tend to create a chain of evidence that might be used against me.

That is all of my statement.

The Court: You have touched on one point there that your counsel has not touched on, and that was with relation to the deportation of aliens. Is there some feeling that you would be subject to deportation? I mean to say, you are a native-born citizen, are you?

Mr. Dobbs: I am, sir.

The Court: Yes?

Mr. Dobbs: I am a native-born citizen. I certainly want to make that clear.

My thinking on it is this, that in view of the fact that the government maintains that—well, I will put it this way—there are now I believe around 150 or 160 cases throughout the country of deportation proceedings of people who are being deported because they are Communists and, according

to the government, therefore favor the advocacy of the overthrow of the government by force and violence. It is only that I am afraid if my testimony before this grand jury might link me to the Communist Party I, too, would fear that possible proceedings could come against me. Not that I am afraid of being deported, of course not.

The Court: Is there anything else that you want to say?

Mr. Dobbs: No, sir.

The Court: Very well.

(The following proceedings were resumed in open court:)

The Court: By the way, the same order of secrecy and privacy made concerning the other witnesses will apply as to Mr. Dobbs until either he or his counsel release it.

Mr. Dobbs has made a statement to me and he has added no additional grounds to that advocated by his counsel, nor shown any other reasons why the court should hold that the answers would incriminate him to any of these questions. Accordingly the order is made that the witness, Mr. Dobbs, shall appear before the grand jury and answer the following questions:

Do you know Dorothy Healey?

Do you know her business and home address?

Do you know her occupation?

Do you know where she can be located?

Do you know if she is married, and if so what her husband's name is?

Do you know her husband's occupation?

Do you understand the order, Mr. Dobbs?

Mr. Dobbs: Yes, sir.

The Court: Very well. Next matter.

Mr. Goldschein: Miss Frances L. Duffy, please.

FRANCES L. DUFFY

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Frances L. Duffy.

The Clerk: Take the stand.

Mr. Goldschein: The next witness, may it please the court, is Samuel Harry Kasinowitz. Mr. Kasinowitz was recalled by the grand jury, may it please the court, and asked certain questions and refused to answer those questions on the ground that the answer would tend to incriminate him. The government challenges that right and asks the court to hear the questions and answers to determine that question.

The Court: Very well.

Direct Examination

By Mr. Goldschein:

Q. This is Miss Frances L. Duffy?

A. Yes, sir.

Q. Miss Duffy, on November 3, 1948, were you the official court reporter in the grand jury?

A. Yes, sir.

The Court: You had been sworn as such?

The Witness: Yes, sir; I have.

(Testimony of Frances L. Duffy.)

Q. (By Mr. Goldschein): Were you present when Samuel Harry Kasinowitz was recalled as a witness before that grand jury? A. I was.

Q. Did you take down in shorthand the questions propounded to him and the answers that he gave? A. I did.

Q. Will you read those questions and answers, please, ma'am, beginning at the beginning, any statement made to him. A. Yes, sir.

"Mr. Goldschein: Mr. Samuel Harry Kasinowitz, recalled.

"Now, Mr. Kasinowitz, this grand jury is not investigating you. They are making an investigation with reference to certain Federal employees who made a false statement to a Federal agency with reference to their affiliation with certain groups or clubs or organization.

"Q. (By Mr. Goldschein): Now, you are not employed by the Federal government, are you?

"A. No.

"Q. Have you ever been employed by the Federal government? A. No.

"Q. To the best of your recollection, are you personally acquainted with any employees of the Federal government?

"A. Not to my knowledge.

"Q. Do you recall the names of any of your friends or acquaintances that are employed by the Federal government?

"A. Not to my knowledge.

"Q. Do you know Dorothy Healey?

(Testimony of Frances L. Duffy.)

"A. Well, I can't answer that question. I haven't had an opportunity to consult with my attorney.

"Q. All right. Do you know her business or home address?

"A. I have to give the same answer.

"Q. Do you know her occupation?

"A. I have to give the same answer to that question.

"Q. Do you know where she can be located?

"A. I will have to give the same answer to that question.

"Q. Do you know whether Dorothy Healey is married?

"A. I still have to give the same answer.

"Q. Do you know what her husband's name is?

"A. Same answer.

"Q. Do you know what his occupation is, if you do know him?

"A. I have to give the same answer.

"Q. We will give you five minutes. Will you step outside. Your lawyer is outside, is he?

"A. Yes.

"Q. Consult with him, and we will have you back. You won't leave? A. No."

Then he was recalled in a few minutes and the following took place:

"Q. (By Mr. Goldschein): Mr. Kasinowitz, did you see your lawyer? A. Yes.

"Q. You had an opportunity to talk with him, did you? A. Yes.

(Testimony of Frances L. Duffy.)

“Q. All right. Now, are you employed by the Federal government? A. No.

“Q. Were you ever employed by the Federal government? A. No.

“Q. Do you recall the name of any of your friends or acquaintances that are employed by the Federal government?

“A. Not to my knowledge. Not to the best of my knowledge can I recall any names.

“Q. Do you know Dorothy Healey?

“A. I must refuse to answer that question on the grounds that it might incriminate me.

“Q. Do you know her business or home address? A. Same answer.

“Q. Do you know her occupation?

“A. Same answer.

“Q. Do you know where she can be located?

“A. Same answer.

“Q. Do you know whether Dorothy Nealey is married? If so, what is her husband's name?

“A. I must give the same answer to that question.

“Q. Do you know what his occupation is, if she is married? A. Same answer.

“Mr. Goldschein: All right, sir. We will recess you, sir, until tomorrow morning, 11:00 o'clock.”

The Court: Cross-examination?

Mr. Margolis: No cross-examination.

The Court: Step down.

(Witness excused.)

Mr. Goldschein: The government insists, may it

please the court, that there is nothing in the questions that will elicit any answer that would tend to incriminate the witness for the violation of a Federal offense. We respectfully ask the court to give the witness an opportunity to be heard privately in chambers so that the court may be able to determine whether or not there is any present danger that the answer that the witness may give may tend to incriminate him for the violation of a Federal offense.

Mr. Margolis: Your Honor please, at this time we wish again to propose that the record in the two cases—pardon me.

(Conference between counsel.)

Your Honor please, I want to again make a motion for a continuance on the same grounds as were previously stated with respect to the matter of Ben Dobbs.

The Court: Same ruling. The motion is denied.

It may be deemed that all of the matters and things offered in support of that motion may be deemed to have been offered in behalf of this witness.

Mr. Margolis: Now, if your Honor please, I would like to suggest, in order to save time, that the entire record as made in the case of Ben Dobbs, the case preceding this one, [205] and in which there was incorporated an earlier record in two other cases, be deemed that each and every part thereof, including the evidence offered, offers of proof, argument and all matters and things, all stipulations, be deemed to be included in and be part of this record as though offered for the first time on behalf of this witness.

The Court: It is so ordered, as well as all of the objections made by either party.

Now does the witness wish to make a statement?

Mr. Margolis: Yes, your Honor.

The Court: Do you wish to do so?

Mr. Kasinowitz: Yes.

The Court: The reporter, Clerk and bailiff will come into chambers.

STATEMENT OF WITNESS KASINOWITZ

(The following proceedings were had in chambers, as follows:)

The Court: Do you wish to make a statement?

Mr. Kasinowitz: Well, your Honor, I hold to the position that I might be incriminated principally on three grounds:

First, the developments which have preceded our involvement in this grand jury hearing, particularly with regard to the trials in New York which come up in a few days, and also with respect to the fact as was indicated in court that the Communist Party is viewed and so designated by the Attorney General's office as a subversive organization, and thirdly on the grounds that in regard to this particular question I have become aware of the fact that Dorothy Healey is or was a leading officer of the Communist Party in Los Angeles, and I feel that my answer of the questions that are directed to me I might place myself in the position of incrimination.

That is essentially the statement that I wish to make.

The Court: Do you have anything else to say?

Mr. Kasinowitz: No.

The Court: No other reasons?

Mr. Kasinowitz: No, sir.

The Court: Very well.

The Court: Same stipulation concerning the grand jury?

Mr. Margolis: Yes, your Honor.

Mr. Goldschein: So stipulated.

The Court: It will be the same order concerning the secrecy and privacy of the witness' statement until released by him or his counsel.

Mr. Kasinowitz has stated to the court privately his reasons for refusing to answer the questions. He has added nothing to the grounds or the reasons heretofore urged by his counsel, nor shown any reason why the answers to these questions would incriminate or tend to incriminate him, and for that reason the order of the court will be the same, that Mr. Kasinowitz is now ordered to appear before the grand jury and to answer the following questions:

Do you know Dorothy Healey?

Do you know her business or home address?

Do you know her occupation?

Do you know where she is located or can be found?

Do you know whether or not she is married?

Do you know the name of her husband?

Do you know her husband's occupation?

Do you understand the order, Mr. Kasinowitz?

Mr. Kasinowitz: Yes, sir.

The Court: Very well.

Next matter.

* * * *

Mr. Goldschein: May it please the court, the witness Henry Steinberg appeared before the grand jury and was asked certain questions which he refused to answer claiming the privilege against self-incrimination. The government believes that he has no privilege of self-incrimination with reference to those particular questions and challenges that privilege of self-incrimination with reference to those particular questions and challenges that privilege and asks the court to hear us on that matter.

The Court: Very well. Proceed.

Mr. Goldsmith: Miss Frances Duffy. [208]

FRANCES L. DUFFY,

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Frances L. Duffy.

The Clerk: Take the stand.

Direct Examination

By Mr. Goldschein:

Q. This is Miss Frances L. Duffy?

A. Yes, sir.

Q. Miss Duffy, on November 3, 1948, were you the official court reporter before this grand jury?

A. I was.

The Court: And had taken your oath?

The Witness: Yes, sir. I took it that day, your Honor.

(Testimony of Frances L. Duffy.)

The Court: Very well.

Q. (By Mr. Goldschein): Were you present when the witness Henry Steinberg was recalled before the grand jury? A. Yes, sir.

Q. Did you take down in shorthand the questions propounded to him and the answers that he gave?

A. I did.

Q. Will you please read to the court the statement made to him, if any, and the questions propounded and the answers he gave.

A. Yes, sir. Immediately after he was in the room Mr. Goldschein said:

“Mr. Goldschein: Henry Steinberg, recalled.

“Mr. Steinberg, this grand jury is not investigating you. They are making an investigation with reference to certain Federal employees who made a false statement to a Federal agency with reference to their affiliation with certain organizations, clubs or groups of people.

“Q. (By Mr. Goldschein): Now, you are not employed by the Federal government, are you?

“A. At the present time, no.

“Q. Were you ever employed by the Federal government? A. At one time.

“Q. Were you at any time ever employed by the Federal government?

“A. I was, yes, sir.

“Q. Now, to the best——

“A. (Continued): I was employed as a soldier.

“Q. In a civilian employment?

“A. As a soldier, 18 months in the Army.

(Testimony of Frances L. Duffy.)

“Q. Did you ever have any civilian employment for the Federal government?

“A. No, I did not.

“Q. To the best of your recollection, are you personally acquainted with any employees of the Federal government?

“A. To the best of my knowledge, I am not.

“Q. And do you know Dorothy Healey?

“A. I refuse to answer that question upon the basis that I may incriminate myself.

“Q. Do you know her business or home address?

“A. I refuse to answer that question on the basis I may incriminate myself.

“Q. Do you know her occupation?

“A. I refuse to answer that question on the same basis.

“Q. Do you know where she can be located?

“A. No, I do not.

“Q. Do you know whether Dorothy Healey is married?

“A. I refuse to answer that question on the basis I may incriminate myself.

“Q. Do you know what her husband's occupation is, if she is married?

“A. I refuse to answer that, on the basis that I may incriminate myself.

“Q. Well, if she is married, do you know her husband's name?

“A. I refuse to answer that on the basis that I may incriminate myself.

“Q. All right, we will recess you until 11:00

(Testimony of Frances L. Duffy.)

o'clock tomorrow morning, Mr. Steinberg. You will report back here? A. Yes, sir.

The Court: Cross-examine?

The Witness: I am sorry. I think there was another hearing. I think he was back.

No, that was just when you told him to report at 1:30.

Mr. Margolis: No cross-examination.

* * * *

Mr. Goldschein: We insist, may it please the court, that there is no self-incrimination involved in the answers that he may give to these questions. We respectfully ask the court to hear the witness privately to determine whether or not the answers to the questions will tend to incriminate him.

The Court: May the same order be made here concerning the record and the objections?

Mr. Margolis: First of all, if your Honor please, I would like to make a motion for a continuance on the grounds [212] previously stated with respect to the matter in re Ben Dobbs.

The Court: Very well. The motion is denied.

Mr. Margolis: We now ask for a similar order incorporating in this case the entire record, including evidence, exhibits, offers of proof, stipulations and all other matters and things, including argument, which have been made a part of the record in the Ben Dobbs case and including, of course, the earlier record incorporated in the Dobbs case.

The Court: That will be the Doran, the Bock, Dobbs, Kasinowitz records which are all included in

this. In the Doran case all of the previous record was incorporated in that case.

Mr. Margolis: That is right.

The Court: What was in that case is in this so it is incorporated by incorporation.

Mr. Margolis: There are several incorporations.

The Court: Yes.

Mr. Margolis: And I think it was understood in each case that the incorporation, so to speak, would be carried forward.

The Court: That is my understanding, at least that is what I had in mind in connection with making the order, that everything that has been offered on behalf of any witness or received will be offered or received on behalf of this witness, subject to all of the objections made of record heretofore [213] by the government.

Mr. Margolis: Yes, your Honor.

The Court: Very well.

Does the witness desire to make a statement privately?

Mr. Steinberg: Yes.

The Court: Very well. We will recess to chambers with the Clerk, the reporter and the bailiff.

STATEMENT OF WITNESS STEINBERG

(The following proceedings were had in chambers, as follows:)

The Court: All right, Mr. Steinberg. Do you wish to make a statement?

Mr. Steinberg: Your Honor, I am aware,

through reading the newspapers, of efforts on the part of the government to accuse, to charge the leadership of the Communist Party with overthrowing the government by force and violence for violation of the Smith Act, as well as the attempts on the part of the government to deport people because of membership in the Communist Party, and I feel that tying myself in in any way in answering these questions would tend to incriminate me.

The Court: Now you mentioned deportation. You are a native-born citizen?

Mr. Steinberg: Yes, sir.

The Court: I mean, you have never taken out citizenship in any other country?

Mr. Steinberg: No, sir.

The Court: Do you have some personal fear of deportation if you might answer these questions?

Mr. Steinberg: Not at all, sir.

The Court: Do you have any other statement?

Mr. Steinberg: That is all.

The Court: Very well. We will reconvene in the courtroom.

(The following proceedings were resumed in open court:)

The Court: Usual stipulation concerning the grand jury?

Mr. Margolis: Yes, your Honor.

Mr. Goldschein: Yes, your Honor.

The Court: The same order concerning privacy here will obtain to Mr. Steinberg as to the others.

Mr. Steinberg has made his statement to me pri-

vately in chambers and what he has said has shown no other or different reason for refusing to answer the questions on the ground they might incriminate him or tend to incriminate him than that heretofore urged in his behalf by his counsel.

For that reason he will be ordered and directed to answer the following questions—Mr. Steinberg?

Mr. Steinberg: Present.

The Court: You will return to the grand jury and answer these questions:

Do you know Dorothy Healey?

Do you know her business or home address?

Do you know her occupation?

He answered the question where she can be located. His answer was "no."

Do you know whether or not she is married?

Do you know her husband's occupation?

Do you know her husband's name?

Do you understand the order?

Mr. Steinberg: Yes, sir.

The Court: Very well.

* * * *

Mr. Goldschein: I have some petitions, may it please the court.

(The documents referred to were passed to the court.)

The Court: Mr. Goldschein has handed me a motion for the issuance of a bench warrant for the arrest of Merle Brodsky, a witness. There appear to be a series of them, Merle Brodsky, Max Ap-

pelman, George Victor Blaine, Ruth Rose Utrecht and Elizabeth Glenn.

Mr. Margolis, are you representing any of those parties?

Mr. Margolis: We have not been retained by them.

The Court: Very well.

You may have your bench warrants for Merle Brodsky, Max Appelman, George Victor Blaine, Ruth Rose Utrecht, and Elizabeth Glenn. Bond is fixed in the sum of \$1000 each.

* * * *

[Endorsed]: Filed April 6, 1949.

In the District Court of the United States in and for
the Southern District of California,
Central Division

Honorable Peirson M. Hall, Judge presiding.

In Re:

No. 8789-PH—LILLIAN ADELE DORAN

No. 8827-PH—PHILLIP BOCK

No. 8839-PH—IRVING CARESS

No. 8842-PH—ROBERT BLAIR

No. 8874-PH—MERLE BRODSKY

No. 9321-PH—FRANK SPECTOR

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California;
March 3, 1949 [1*]

Appearances: For the Government: James M. Carter, United States Attorney, Los Angeles 12, California. For the Respondents: Margolis & McTernan, 112 West Ninth Street, Los Angeles 15, California; by John T. McTernan, Esq.; and Esther Shandler. [2]

The Court: Mr. Carter, do you have at matter?

Mr. Carter: If the Court please, the Grand Jury is here present. It desires to present to the Court six persons who have refused to answer questions before the Grand Jury after having been previously ordered to answer by the Court. They make

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

the presentment here in the nature of a civil contempt against Lillian Doran, Philip Bock, Merle Brodsky, Frank Spector, Robert Blair and Irving Caress.

The Grand Jury is present.

* * * *

[4]

The Court: Very well. We will now proceed in contempt. Call the roll of the Grand Jury, Mr. Clerk.

(Roll call of the Grand Jury by the Clerk.)

The Clerk: A quorum is present, your Honor.

The Court: Mr. Foreman, you heard the statement of Mr. Carter, the United States Attorney. A quorum of the Grand Jury is present. Is it the desire of the Grand Jury to proceed with the presentment at this time?

Foreman Ahlswede: Yes, it is, your Honor.

The Court: Very well. Mr. Carter?

Mr. Carter: Call Miss Duffy.

The Court: Are these the same witnesses which I had at the last hearing?

Mr. Carter: Four of them are—Spector, Brodsky, Blair and Caress.

The Court: Is the transcript prepared, Mr. Reporter?

The Reporter: Yes, your Honor.

The Court: The witnesses you designated are Caress, Blair, Brodsky and Spector?

Mr. Carter: That is correct, and two others, Philip Bock and Lillian Doran. There six altogether. [5]

The Court: Is Lillian Doran present?

Mrs. Doran: Yes.

The Court: Is Phillip Bock present?

Mr. Bock: Yes.

The Court: Is Frank Spector here?

Mr. Spector: Here.

The Court: Is Merle Brodsky here?

Mr. Brodsky: Here.

The Court: Mr. Robert Blair?

Mr. Blair: Here.

The Court: Mr. Irving Caress?

Mr. Caress: Here.

The Court: Very well. Proceed.

Mr. Carter: For the record, I will first call attention to the Reporter's Transcript of the proceedings of February 23, 1949, in this Court, beginning at page 127 where the Court made an order that certain questions be answered.

The Court: What transcript?

Mr. Carter: The Reporter's Transcript of February 18, and 23, 1949, page 127, where the order appears as to four of the witnesses, namely, Spector, Brodsky, Blair and Caress.

I will call Miss Duffy.

FRANCES L. DUFFY

being called as a witness by and in behalf of the government having been first duly sworn, was examined and testified as [6] follows:

The Clerk: Will you state your name for the record?

The Witness: Frances L. Duffy.

The Clerk: Take the stand, please.

(Testimony of Frances L. Duffy.)

Direct Examination

By Mr. Carter:

Q. Miss Duffy, you are the official court reporter servicing the Grand Jury? A. Yes, sir.

Q. Were you present this morning at about 9:30 in the Grand Jury room in this building?

A. I was.

Q. And you were sworn as a reporter to take the proceedings of the Grand Jury?

A. I have been; yes, sir.

Q. Did you take the proceedings this morning before the Grand Jury? A. I did.

Q. Will you read your transcript beginning with the opening of the proceedings this morning before the Grand Jury?

The Court: Was a witness called?

Mr. Carter: Yes.

The Court: Which witness?

The Witness: Mr. Spector was the first witness. [7]

By Mr. Carter:

Q. Let me ask you this question generally then: was Frank Spector called as a witness this morning?

A. Yes, sir.

Q. Was Merle Brodsky called as a witness?

A. Yes, sir.

Q. Was Robert Blair called as a witness?

A. Yes, sir.

Q. Was Irving Caress called as a witness?

A. Yes, sir.

Q. And your notes indicate that? A. Yes.

(Testimony of Frances L. Duffy.)

The Court: Lillian Doran?

Mr. Carter: She was not there this morning. I have another transcript on that.

Q. Do your notes show the testimony of these four witnesses this morning before the Grand Jury?

A. They do.

The Court: That is, Caress, Blair, Brodsky and Spector?

Mr. Carter: That is correct.

The Court: Very well.

The Witness: Mr. Carter said, bring Mr. Spector in first and Mr. Spector came in and was questions:

“By Mr. Carter:

“Q. Mr. Spector, you have been previously sworn [8] before this Grand Jury, have you not?

“A. Yes.

“Q. Just take a chair there.

“Q. Your full name is what?

“A. Frank E. Spector.

“Q. Mr. Spector, you were in the courtroom of Judge Hall on February 23rd, were you not, when he made an order concerning certain questions you should answer? A. I was.

“Q. And you heard him make that order?

“A. I did.

“Q. You were directed by him to appear before this Grand Jury and answer certain questions. I am referring now to page 127 of the Reporter's Transcript of February 23rd—starting in on February 18th and winding up on February 23rd—in which the

(Testimony of Frances L. Duffy.)

order in your presence, did he not, that you answer certain questions before this Grand Jury?

“A. That is correct.

“Mr. Carter: I will read from page 128 of the record, from the Reporter’s Transcript of February 18 and 23, line 18:

“ ‘The Court: Mr. Caress, you are ordered and directed to be and appear before the Grand Jury of this district in the office in the Federal Building on Thursday, March 3rd, at 9:30 o’clock in the morning of that day, and at that time and place to answer the following questions:’

“Do you remember that order?

“The Witness: That is right.

“Mr. Carter: Do you remember the questions the Court ordered you to answer?

“The Witness: Not specifically; in general I remember them.

“Mr. Carter: I will read them to you:

“ ‘Can you tell us the table of organization of the Communist Party of Los Angeles County?’ [12]

“The Witness: That is the question?

“Mr. Carter: That is the question.

“The Witness: I have to refuse to answer that on the same grounds I refused previously.

“Q. By Mr. Carter: What are those?

“A. On the ground it might tend to incriminate me, and is an inquiry into my political beliefs based upon the First and Fifth Amendments.

“Q. ‘Do you know who in the Los Angeles County

(Testimony of Frances L. Duffy.)

Communist Party setup has knowledge of or is in charge of membership?’

“A. I have to refuse to answer on the same ground.

“Q. ‘Do you know Dorothy Healey?’

“A. I have to refuse to answer on the same ground.

“Q. ‘Do you know where she lives?’

“A. I refuse to answer on the same ground.

“Q. ‘Do you know where she can be found or located?’

“A. Same answer.

“Q. ‘Do you know her husband’s name?’

“A. Same answer.

“Q. ‘Do you know his occupation?’

“A. Same answer. [13]

“Q. ‘Do you know any person in this county who advocates the overthrow of the government of the United States by force and violence?’

“A. Same answer.

“Q. ‘Do you know any organization in this county which has as its purpose the overthrow of the government by force and violence?’

“A. Same answer.

“Q. And you make these refusals, do you, having in mind that the Court ordered you to answer those questions?

“A. I have in mind that these questions are an inquiry that violates my rights under the amendments to the Constitution, and violate my rights under the First and Fifth Amendments to the Constitution.

(Testimony of Frances L. Duffy.)

"Q. You also have in mind that the Court ordered you to answer those questions?

"A. I have in mind that I think the Court was unjustified in ordering it, and that it was an illegal order.

"Mr. Carter: Stand outside."

Mr. Carter: That is the presentment against Irving Caress.

Q. Now will you read the record taken this morning as to Mr. Brodsky? [14]

A. Yes.

"By Mr. Carter:

"Q. Your name is Merle Brodsky?

"A. That is right.

"Q. Mr. Brodsky, you were in court on February 23rd, in the courtroom of Judge Peirson Hall, were you not? "A. I was.

"Q. When he made an order that you answer certain questions?

"A. I believe that was the day.

"Q. Reading from page 130 of the reporter's transcript of proceedings for the dates of February 18 and 23, 1949, I will read you the judge's orders:

" 'Mr. Brodsky, you are now ordered and directed to be and appear before the grand jury of this district at its place of meeting on the sixth floor of this building on Thursday, March 3rd, at 9:30 o'clock in the morning of that day, and then and there make answer to the following questions.'

"Do you recall he made an order to that effect?

"A. I recall.

"Q. I will now read you and ask you again those

(Testimony of Frances L. Duffy.)

questions which he ordered you to answer:

“ ‘Do you know and can you tell us the table of [15] organization of the Communist Party of Los Angeles County?’

“ ‘A. I refuse to answer that question on the ground that it might incriminate me and furthermore I believe it is an inquiry into my political beliefs.

“ ‘Q. ‘Do you know who in the Communist Party in Los Angeles County is in charge of membership or membership rolls?’

“ ‘A. I refuse to answer on the same ground.

“ ‘Q. ‘Do you know Dorothy Healy?’

“ ‘A. I refuse to answer on the same ground.

“ ‘Q. ‘Do you know what her business or residence address is, or where she can be located?’

“ ‘A. I refuse to answer on the same ground.

“ ‘Q. ‘Do you know her husband’s name?’

“ ‘A. I refuse to answer on the same ground.

“ ‘Q. ‘Do you know his—that is, her husband’s—business or occupation?’

“ ‘A. I refuse to answer on the same ground.

“ ‘Q. ‘Do you know what her business or occupation is?’

“ ‘A. I refuse to answer on the same ground.

“ ‘Q. ‘Do you know any person in the County of Los Angeles who advocates the overthrow of the government [16] of the United States by force and violence?’

“ ‘A. I refuse to answer on the same ground.

“ ‘Q. ‘Do you know an organization in the County of Los Angeles that has for its purpose the overthrow

(Testimony of Frances L. Duffy.)

of the United States government by force and violence?’

“A. I refuse to answer on the same ground.

“Q. ‘Who are you an organizer for?’

“A. I refuse to answer on the same ground.

“Q. Now, in refusing to answer those questions, Mr. Brodsky, do you have in mind that the court ordered you to answer them?

“A. I have refused to answer the questions on the ground that I think I answered before.

“Q. But you are familiar with the fact that these are the questions the court ordered you to answer?

“A. I am familiar with that, yes.

“Mr. Carter: Will you stand aside?”

Mr. Carter: That is the presentment against against Merle Brodsky.

Q. Will you now read the transcript as it concerns Mr. Robert Blair? A. Yes.

“By Mr. Carter: [17]

“Q. Your full name is Robert Blair?

“A. That is right.

“Q. Mr. Blair, have a chair. You were previously sworn to testify before this grand jury, were you not?

“A. I was.

“Q. Mr. Blair, were you in the courtroom of Judge Peirson Hall on February 23, 1949, when he made an order that you should answer certain questions? “A. I was.

“Q. From page 131 of the reporter’s transcript for the dates of February 18 and 23, I will read you the court’s order:

“ ‘Mr. Blair, you are ordered and directed to be

(Testimony of Frances L. Duffy.)

and appear before the Federal grand jury of this district in its office on the sixth floor of this building on March 3rd at the hour of 9:30 o'clock in the morning of that day and then and there make answer to the following questions.'

"The court then listed certain questions, which I will now re-ask of you:

" 'Do you know the table of organization or who the officials of the Communist Party are?'

"A. I refuse to answer that question on the [18] ground I previously stated in answer to that question.

"Q. Will you state your ground again, so we have it for the record.

"A. My grounds are, first, this would be a possible self-incrimination on the basis of the Fifth Amendment of the Constitution.

"Likewise, I refuse to answer the question on the ground it is an invasion of my constitutional rights, because it invades my right of political belief and association.

"Q. You mentioned your ground of self-incrimination, did you? "A. Yes.

"Q. 'Do you know who or what officer of the Communist Party of Los Angeles County is in charge of membership or has knowledge of the membership rolls in this county?'

"A. I refuse to answer that on the same grounds.

"Q. 'Do you know Dorothy Healy?'

"A. I repeat the same answer.

"Q. You mean you refuse—

"A. I refuse again to answer.

(Testimony of Frances L. Duffy.)

“Q. ‘Do you know where she can be located or can be found?’ [19]

“A. I refuse to answer that question, likewise, on the grounds of self-incrimination and the right to my own political belief and association.

“Q. ‘Do you know her business or home address?’

“A. Same answer.

“Q. ‘Do you know her business or occupation?’

“A. I repeat the same answer.

“Q. ‘Do you know what her husband’s name is?’

“A. I refuse to answer that, likewise, on the same grounds.

“Q. ‘Do you know his occupation, her husband’s occupation?’

“A. I refuse to answer that question on the same ground as given.

“Q. ‘Have you seen Dorothy Healy recently?’

“A. I refuse to answer that question on the same ground.

“Q. ‘Do you know any person in the County of Los Angeles who advocates the overthrow of the government of the United States by force and violence?’

“A. I refuse to answer that question, likewise, on the same ground.

“Q. ‘Do you know any organization in the County of Los Angeles which has the announced purpose of [20] the overthrow of the government of the United States by force and violence?’

“A. Same answer.

“Q. ‘Do you know Elizabeth Glenn?’

“A. Same answer.

(Testimony of Frances L. Duffy.)

“Q. ‘Do you know Mrs. Houdek?’

“A. Same answer.

“Q. In refusing to answer these questions, you have in mind, have you not, that these are the questions which the court ordered you to answer?

“A. I may be mistaken, but it seems to me that there are one or two extra questions there in connection with the—I think the last three or four questions, you turned around the question, ‘Do you know an organization that advocates the overthrow—’

“Q. You recall those questions. Do you mean the ones following that?

“A. I thought it was just one there.

“Q. No, I am reading from the transcript, page 132, and the questions beginning at line 19 are:

“‘Have you seen Dorothy Healy recently?’ You remember that?

“A. Yes. It was just the last couple.

“Q. The next was: [21]

“‘Q. Do you know any person in the County of Los Angeles who advocates the overthrow of the government of the United States by force and violence?’ The next question was:

“‘Q. Do you know any organization in the County of Los Angeles which has the announced purpose of the overthrow of the government of the United States by force and violence?’ And then the last two are:

“‘Q. Do you know Elizabeth Glenn?’ and ‘Q. Do you know Mrs. Houdek?’ That is on page 133.

“You refuse to answer all of these questions?

“A. I do.

“Mr. Carter: Will you remain outside.”

Mr. Carter: That is the presentment against Robert Blair.

Q. Now as to Phillip Bock and Lillian Doran. Did you report proceedings before the grand jury on January 12, 1949, Miss Duffy?

A. Yes, I did.

The Court: Let us see. Is this a presentment against Bock and Doran for contempt of or is this a presentment to get them ordered to answer questions?

Mr. Carter: For contempt, because they went back and again refused to answer. [22]

The Court: When were they ordered to answer the questions?

Mr. Carter: On November 4, 1948, page 122 of the transcript of that day, as to Bock. And Doran, transcript of the same day, November 4, 1948, page 93.

The Court: What is it as to Bock, page what?

Mr. Carter: Page 122.

The Court: And as to Doran?

Mr. Carter: Page 93.

The Court: Very well. You are proceeding now against whom?

Mr. Carter: First Lillian Doran.

The Court: Very well.

By Mr. Carter:

Q. Did you report the proceedings before this grand jury on January 12, 1949? A. I did.

Q. I show you an original and a copy of transcript prepared concerning Lillian Doran on that day. Can you tell me what those are?

(Testimony of Frances L. Duffy.)

A. This is the transcript of my notes of the questions asked of Lillian Doran and the answers given by her on that day, and a carbon copy of the same.

Q. I hand you the copy, which is a duplicate of the original, is it not? [23] A. Yes, sir.

Q. And ask you to refer to page 7 thereon, line 16. Now at that time was Lillian Doran the witness before the grand jury? A. Yes, sir.

Q. And she had been sworn, had she?

A. Yes, she was sworn.

Q. Will you read the transcript beginning at page 7, line 16? A. Yes.

“Q. (By Mr. Carter): Do you recall that when you were in the courtroom—”

Q. These questions were put to Lillian Doran, were they not? A. Yes, they were.

Q. And the answers were given by her?

A. Yes, sir.

Q. All right. Continue.

A. “Q. Do you recall that when you were in the courtroom of Judge Hall on November 4, 1948—for the record, page 93 of the transcript of that date—the judge stated as follows:

“‘For that reason the order of the court will be that the witness is ordered and directed to answer the following questions—and in that connection [24] I would like also to observe that Government’s Exhibit 1, the transcript of the testimony before the grand jury, is entitled “In the Matter of: Loyalty of Government Employees.” The questions are:

“And these are the questions Judge Hall ordered you to answer, and I am going to read these questions to you now, one at a time.

(Testimony of Frances L. Duffy.)

"I will ask you, first, you recall the judge ordered you to answer certain questions? "A. Yes.

"Q. These are the questions:

" 'Do you know Ned Sparks?'

"I am asking you that question.

"A. I refuse to answer on the ground it might tend to incriminate me.

"Q. 'Do you have any occupation other than that of housewife?'

"A. I did have. I am a graduate nurse. I haven't worked for two or three years.

"Q. The question is: 'Do you have,' at the time the court asked you the question, 'any occupation other than that of housewife?' "A. No.

"Q. 'Do you Know Dorothy Healy?' [25]

"A. Do you want me to repeat my answer?

"Q. I am asking you the question.

"A. I refuse to answer on the ground it might tend to incriminate me.

"Q. 'Do you know her business or home address?'

"A. I refuse to answer on the ground it might tend to incriminate me.

"Q. 'Do you know her occupation?'

"A. I refuse to answer on the ground it might tend to incriminate me.

"Q. 'Do you know where she can be located?'

"A. I refuse to answer on the ground it might tend to incriminate me.

"Q. 'Do you know whether Dorothy Healy is married?'

"A. I refuse to answer that question on the ground it might tend to incriminate me.

(Testimony of Frances L. Duffy.)

“Q. ‘Do you know her husband’s name?’

“A. I refuse to answer that question on the ground it might tend to incriminate me.

“Q. ‘Do you know his occupation?’

“A. I refuse to answer on the ground it might tend to incriminate me.

“Q. ‘If you do know his occupation, will you [26] tell us what his occupation is?’

“A. I refuse to answer on the grounds it might tend to incriminate me.

“Q. And you make those answers, having in mind that the court ordered you to answer those questions? “A. Yes.”

Mr. Carter: That is sufficient. That is the presentment as to Lillian Doran.

The Court: Very well.

By Mr. Carter:

Q. Now on that same day before the grand jury, January 12, 1949, was Phillip Bock a witness?

A. Yes, he was.

Q. I show you the original and a copy of a transcript apparently made by you. Tell us what that is.

A. That is a transcript of my notes of the questions asked by you of Mr. Bock and the answers given by him.

Q. Will you take the copy, turn to page 9, line 11. Now at that time was Mr. Bock on the witness stand? A. Yes, he was.

Q. Had he been sworn? A. He had.

Q. Will you begin reading at page 9, line 11—at line 8, rather. [27] A. Yes.

(Testimony of Frances L. Duffy.)

“Q. Well, were you ordered by Judge Hall to answer some questions? “A. Yes, I was.

“Q. Do you recall being in Judge Hall’s court on November 4, 1948, at which time the question of your claim of privilege was gone into, and the court made an order that you answer certain questions?

“A. I don’t recall the date and time, but around that time I was there, I recall.

“Mr. Carter: For the record, I refer to page 122 of the transcript of the proceedings of the District Court on November 4, 1948.

“I will read to you Judge Hall’s statement from that transcript:

“ ‘The Court: I have heard Mr. Bock’s statement in chambers—incidentally, I ordered, not only as to his statement as to the previous witness’ statement, that they remain private and confidential and secret unless and until they are requested either by the witness or counsel.

“ ‘The witness has stated his reasons, some of them in addition to those that are by counsel, but I cannot see anything in them which would tend to [28] show that answering questions which are now pending would incriminate or tend to incriminate, and for that reason I must order the witness to answer the questions.

“ ‘It will, therefore, be the order of the court that the witness Phillip Bock is ordered and directed to answer the following questions:

“ ‘Do you know Dorothy Healy?

“ ‘Do you know the business and home address or home address of Dorothy Healy?

(Testimony of Frances L. Duffy.)

“ ‘Do you know the occupation of Dorothy Healy?

“ ‘Do you know whether or not Dorothy Healy is married?

“ ‘Do you know her husband’s name?

“ ‘Do you know his occupation?

“ ‘What is his occupation?

“ ‘Do you understand the order, Mr. Bock?

“ ‘Mr. Bock: Yes, sir.

“ ‘The Court: Very well.’

“By Mr. Carter:

“Q. Do you recall that?

“A. Yes, I do.

“Q. Now, I want to give you an opportunity to comply with that order of the court, and his order that you answer these questions, and I will ask you [29] the same questions in the same order in which they appear in his order.

“Do you know Dorothy Healy?

“A. I refuse to answer that question on the ground it might tend to incriminate me.

“Q. Do you know the business and home address of Dorothy Healy?

“A. I refuse to answer that question on the ground it might tend to incriminate me.

“Q. Do you know the occupation of Dorothy Healy?

“A. I refused to answer that question on the ground it might tend to incriminate me.

“Q. Do you know whether or not Dorothy Healy is married?

“A. I refuse to answer that question on the ground it might tend to incriminate me.

(Testimony of Frances L. Duffy.)

“Q. Do you know her husband’s name?

“A. I refuse to answer that question on the ground it might tend to incriminate me.

“Q. Do you know his occupation?

“A. I refuse to answer that question on the ground it might tend to incriminate me.

“Q. What is his occupation?

“A. I refuse to answer that question on the grounds it might tend to incriminate me.” [30]

Mr. Carter: That is sufficient.

That is the presentment against Phillip Bock.

The Court: The grand jury rests?

Mr. Carter: The grand jury rests.

It is the opinion of the Government that this is a flagrant disregard of the court’s orders to answer questions which were, many of them, preliminary in their nature which stymied the inquiry of the grand jury at the threshold of this inquiry.

The Court: Mr. McTernan?

Mr. McTernan: Yes, your Honor.

The Court: Are you counsel for all of these witnesses, Mr. McTernan?

Mr. McTernan: I have entered an appearance before, your Honor. I would like at this time, if it is needed for this proceeding, to enter an appearance by Miss Esther Shandler and myself for all of the persons against whom presentments have been made, as well as by the firm of Margolis & McTernan.

The Court: To keep the record straight, Mr. Caress, you desire that Miss Shandler and Mr. McTernan act as your counsel in this proceeding?

Mr. Caress: Yes, sir.

(Testimony of Frances L. Duffy.)

The Court: Mr. Blair, what is your desire?

Mr. Blair: I do. [31]

The Court: Mr. Brodsky?

Mr. Brodsky: I do.

The Court: Mr. Spector?

Mr. Spector: Yes.

The Court: Is that your desire?

Mr. Spector: Indeed.

The Court: Mr. Bock?

Mr. Bock: Yes.

The Court: And Miss Doran, is it?

Mrs. Doran: Yes.

The Court: Should we address you as Miss or Mrs.?

Mrs. Doran: Mrs.

The Court: Mrs.?

Mrs. Doran: Yes.

The Court: And what is the name?

Mrs. Doran: D-o-r-a-n.

The Court: Thank you.

Very well.

Mr. Carter: May the record show that Mr. McTernan, although his appearance has just been entered, has previously appeared as counsel for these witnesses?

The Court: His appearance has just been entered in this proceeding, which is a separate proceeding from the previous proceedings.

Mr. McTernan: At this time, your Honor, we move for a [32] continuance of all of the matters which have been presented to your Honor on the following grounds:

(Testimony of Frances L. Duffy.)

First, that the issues presented here this morning are no different in kind or in nature from the issues involved in the proceedings on October 25th, which were proceedings in civil contempt involving many of the same questions involved here, and the questions are essentially no different, so far as the legal issues raised, from the questions involved in the proceedings in criminal contempt against the defendant Dobbs, Kasinowitz and Steinberg, and that there is no point in proceeding to an adjudication at this time while the basic questions as to the power of the government to ask these questions—

The Court: Do you want to cross-examine this lady?

Mr. McTernan: I don't think so, your Honor. Before engaging in the trial I am trying to ask for a continuance of the trial. I will be glad to excuse Miss Duffy subject to call in the event it turns up in the course of the trial that I may have some questions.

The Court: I have denied your motion for a continuance at the beginning.

Mr. McTernan: I didn't know that it had been denied.

The Court: You stood right over there and asked for a continuance. I said we would proceed and I asked the foreman of the grand jury if he desired to proceed at this time, [33] so we are proceeding with the government's presentment.

Now do you wish to cross-examine this witness on the government's presentment of these witnesses?

Mr. McTernan: No, I do not.

The Court: You may step down and be excused.

(Witness excused.)

The Court: Very well.

Mr. McTernan: My recollection, your Honor, is that I have not heretofore made a motion for a continuance in this matter. You asked me how long I thought it would take and I said I didn't know because I wasn't prepared, and I intended to indicate in greater detail my lack of preparation in the course of making this motion.

The Court: Proceed.

Mr. McTernan: Since the issues raised by the presentment here are the same as those now on appeal before the United States Court of Appeals in the appeal from the court's judgment entered on October 25th, there is no end to be served by a further and repetitive and cumulative adjudication of the legal issues presented here.

Furthermore, it simply subjects these witnesses and these defendants to further harassment and annoyance at the hands of the government in the course of their illegal and improper inquiry, all of which issues are before the Court of Appeals and should be determined before this court goes [34] any further.

Secondly, counsel for these witnesses has not had an adequate time to prepare in this matter. I was advised by a letter from Mr. Carter, which was received in my office during the day on March 1st, that he intended to proceed in contempt proceedings against these people. Your Honor knows—

The Court: What would you need to prepare, counsel?

Mr. McTernan: I was just about to tell you that, your Honor.

Your Honor knows from our other proceedings that in order to prepare our record we need to subpoena witnesses who are not only officers of this court but also the Attorney General of the United States. It would have been a futile and idle procedure to attempt to subpoena the Attorney General of the United States to be here on March 3rd, having been notified of the goevrnment's intention to institute such a proceeding only during the day on March 1st.

We, therefore, request that we be given a reasonable continuance in order to subpoena the necessary witnesses.

The Court: What witnesses?

Mr. McTernan: Specifically the Attorney General of the United States, the Clerk of this court and the jury commissioner of this court.

The Court: The Clerk and the jury commissioner are here. I do not know whether we have a jury commissioner now or not. [35] I think he resigned.

The Clerk: I don't think so, your Honor.

The Court: I do not know.

Have you completed your statement?

Mr. McTernan: I wanted to also say, your Honor, that there have been a number of proceedings before this court involving the same or related legal problems, the transcripts are now rather voluminous, the exhibits are numerous, and we have been attempting to collate the material and prepare for this proceeding and we haven't been able to complete that process

and we would like more time to be able to get our record completely straight so as to avoid duplication but at the same time being sure that our record was complete.

For all those reasons we ask for a reasonable continuance.

The Court: Do you wish to be heard, Mr. Carter?

Mr. Carter: The questions which would be raised by these witnesses have already been passed on by this court. I take it that the Clerk and jury commissioner would be witnesses to the question as to the composition of this grand jury. This court has ruled that a witness cannot question the composition of the grand jury.

So far as the appearance of the Attorney General is concerned, that has already been ruled on.

In addition, I might say that no showing has been made [36] that counsel has not had an opportunity to subpoena the Clerk and the jury commissioner here. No proper showing has been made.

Mr. McTernan: Your Honor, I misstated my request when I summarized my remarks. My basic request is that these proceedings be held in abeyance until such time as the appeal before the United States Court of Appeals is determined, since the legal questions presented here are no different from those and the whole question of the claim of privilege is no different—

The Court: If they are no different, why do you need time to prepare?

Mr. McTernan: I need time to prepare my record, your Honor. I anticipate that your Honor's rulings will be substantially the same as they have been in

the past, but unless my record is straight, so far as the appearance of witnesses and the asking of questions is concerned, the record of these people may not be complete and they may be substantially prejudiced.

The Court: You are satisfied that your record is complete in the other cases, are you not?

Mr. McTernan: Well, no, your Honor. As a matter of fact, one of the grounds of appeal was that your Honor did not give us sufficient time to prepare our record or obtain evidence and that there was a substantial denial of due process. [38]

The Court: You are talking about making a record, are you not?

Mr. McTernan: Yes, I am talking about making a record.

The Court: Very well. The motion for a continuance is denied.

As to whether or not all of the issues which are involved in this case are presented in the case which is now pending on appeal, as I have heretofore indicated, there are certain questions which are before the Circuit of Appeals which were directed to the witnesses and they were directed to answer them. Each question has to stand on its own footing.

In so far as not having adequate time to prepare, the questions were asked of Lillian Doran and Phillip Bock back on November 4, 1948. The instructions were given to Irving Caress, Brodsky, Blair and Spector on February 23rd. They were directed to be and appear before the grand jury on March 3rd.

At that time each of the parties had the same counsel. On each of those hearings all of the ques-

tions of the materiality of the questions, as well as whether or not the answers would incriminate the witnesses, as well as whether or not they had a right were gone into and ruled upon. The witnesses were to refuse to answer them on the ground that it might violate their rights under the First Amendment, [38] were gone into and ruled upon. The witnesses were ordered to appear on March 3rd. I am satisfied that the advice to the witnesses not to answer the questions was not suddenly thought of this morning and given by counsel to the witnesses, but that counsel has known, as well as the witnesses have known, as indicated by their attitude and, as I recall the statement by counsel in this courtroom, that he would advise the witnesses not to answer the questions.

* * * *

[39]

Mr. McTernan: If the court please, the grounds upon which we defend against the presentment made here this morning are as follows:

That the proceeding and all of the proceedings which antedated and in which this proceeding culminates constitute an abuse of process of the court.

Secondly, that in this proceeding, and in all proceedings leading up to this proceeding, these witnesses have been denied due process of law in that they have been denied equal protection of the law.

That the grand jury which made the presentment was improperly selected and is an illegal and void grand jury.

That the grand jury is without power to inquire into the matters involved in the presentment and the court is [40] without power to compel answers to questions directed to such matters.

And, finally, that the answers to the questions might tend to incriminate each of the witnesses.

The Court: The grand jury is without power to inquire and the court is without power to compel? You did not state your ground.

Mr. McTernan: I thought I said, your Honor, that the grand jury is without power to inquire into the matters involved in the presentment and the court is without power to compel answers to the questions.

The Court: But you did not state your ground. Why is it without power?

Mr. McTernan: I am simply giving you a summary of the various points, your Honor.

The Court: Very well.

Mr. McTernan: Now taking these up individually, the first point is the abuse of process.

With reference to the witness Bock, we offer all of the matters and things which were presented to the court and received in evidence in connection with the criminal presentments against the defendants Dobbs, Kasinowitz and Steinberg.

In this connection, your Honor. I think the facts are uncontradicted. Bock was one of the ten persons who was adjudicated in the civil contempt the night of October 25, [41] and committed to the county jail pursuant to this court's order, was released on the stay ordered by Judge Denman of the United States Court of Appeals on November 3rd, and was subpoenaed to reappear forthwith instanter before the grand jury as he left the jail house.

I think we can agree on those facts, can we not, Mr. Carter?

Mr. Carter: I think they all show in the record.

Mr. McTernan: They don't show in this record.

Mr. Carter: Whatever appears from the previous record.

The Court: I take it, Mr. McTernan, that probably in order that nothing will be missed in this record that I might suggest a stipulation that all of the matters and things heretofore offered in opposition to the order of the court directing these or any of the other witnesses to answer the questions, in opposition to the motion for civil contempt, in opposition and in defense of the charge of criminal contempt by those designated witnesses, and in opposition to the order of the court directed to these specific witnesses to answer these specific questions heretofore made, may be deemed to be before the court and a part of the record with the same force and effect as if it were here reintroduced or offered, if it is in evidence, or presented, if it was argument or law.

Is that stipulation agreeable? [42]

Mr. Carter: That is satisfactory with the government.

Mr. McTernan: May I suggest one addition, your Honor, because I am not sure it is included within your Honor's language, and that it include the record adduced in connection with the government's motion to compel Bock and Dorran to answer questions.

The Court: I included that. I said all these and all other witnesses.

Mr. McTernan: I was afraid that your Honor's language limited it to the proceedings in which there were contempt adjudications and not to include both the contempt proceedings and the proceedings to compel answers.

The Court: I intended to say that and I thought I did. In other words, that everything offered in opposition to the order of the court directing them to answer questions, as well as everything offered in defense of the presentments for contempt, whether civil or criminal, if it be evidence, that it be deemed to have been offered, if it be offers of proof, it be deemed to be offered, if it be argument and law, that it be deemed to have been said.

Mr. McTernan: Thank you, your Honor. That stipulation is accepted by the witnesses.

I would like to call Mr. Carter. [43]

JAMES M. CARTER

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name for the record, please?

The Witness: James M. Carter.

The Clerk: Take the stand.

Direct Examination

By Mr. McTernan:

Q. Mr. Carter, you have been previously identified in these proceedings. A. Yes.

Q. You caused subpoenas to issue for the witnesses Blair, Brodsky and Caress, did you not?

A. I did.

Q. And thereafter you made application to this court for bench warrants for their arrest as witnesses, did you not?

A. The record, I think, speaks for itself. There is a file on each one of those gentlemen.

(Testimony of James M. Carter.)

Q. You did cause that to be done, did you not?

A. I filed the applications, that is right.

Q. Now each of these three witnesses were arrested pursuant to the bench warrant sometime during the month of December, [44] 1948, is that not so?

A. I was not personally present. The court records will state what dates they were arrested on. I have no personal recollection of the exact date.

Q. Will you stipulate that they were arrested during the month of December, 1948?

The Court: We will get the record here. The files will show.

The Witness: I have some notes here that I think I could give you an approximate date.

The Court: The official file will show the date they were presented in court, and I can take judicial notice of it. What three did you refer to?

The Witness: Blair, Brodsky and Caress, the three witnesses who were arrested on bench warrants.

The Court: Mr. Clerk, these are new proceedings and should have new numbers.

The Clerk: Yes, your Honor.

The Court: For Brodsky, Caress and Blair.

The Clerk: Yes, your Honor.

The Court: It appears, in so far as Brodsky is concerned, that he was arrested on November 17, 1948, and bond was fixed in the sum of \$1,000.

Mr. McTernan: On what date?

The Court: Same date; November 17. [45]

Mr. Carter: I think he was actually arrested on the 16th. He was in court I think on the 17th.

(Testimony of James M. Carter.)

Mr. McTernan: My understanding was that he spent one night in jail.

The Court: Yes. The return shows his arrest on the 16th and his presentment to the court the following morning on the 17th.

The matter of Caress shows his arrest on the 3rd day of December and his presentment to the court on December 4th; bond fixed in the sum of \$4,000.

As to Blair, the return shows the arrest of Robert Blair on November 19, 1948, and bond fixed on that same day, November 19th, in the sum of \$2,500.

Mr. McTernan: Your Honor, does the record that you have shown the day on which they were ordered to appear before the grand jury?

The Court: Yes, I think so. (Examining file.) This record does not. One of them does. He was ordered to appear, bond continued that he appear before the grand jury of this court on November 24, 1948, at 2:00 p.m.

Blair's bond was fixed in the amount of \$2,500 and he was ordered to appear before the grand jury next Wednesday—that was on November 19, 1948—and the next Wednesday would have been November 24.

Mr. Caress was ordered to appear before the grand jury [46] on the sixth floor of this building on December 15th. The order was made on December 4th.

Mr. McTernan: Thank you, your Honor.

The Court: Very well.

By Mr. McTernan:

Q. Now, Mr. Carter, do your records which you

(Testimony of James M. Carter.)

have with you show the dates subsequent to the dates just given by the court upon which these three witnesses were recalled from and after the first date on which they were told to appear before the grand jury? A. Not accurately.

Q. Do you have the approximate dates?

A. Well, the grand jury—I have various dates in which the grand jury met. They are only pencil notes and they are not accurate.

Q. Isn't it a fact that according to your recollection Brodsky and Blair, who were originally called before the grand jury on November 24, 1948, were called back before the grand jury on or about December 15, 1948?

Mr. Carter: I am going to object to the question on the ground that it is immaterial, without the issues of the case; that the grand jury is conducting its business has a right to take into account other affairs besides the matter of a few recalcitrant witnesses; that the court will take judicial notice that it has other business to attend to besides the [47] four gentlemen in question.

The Court: What is the purpose of your proof?

Mr. McTernan: I want to show, your Honor, that these facts in connection with our claim that this proceeding and everything that went before it is an abuse of process, to show that these people have been repeatedly summoned back, and back, and back before this grand jury as part of our proof that the sole purpose of this proceeding and everything that went before it is to harass and annoy people by this repetitive calling back and asking them ques-

(Testimony of James M. Carter.)

tions, the legal power as to which, as to the asking of which, is already being determined on appeal, simply as part of the government's plan to harass and annoy people and apply the law discriminatorily against them because the government disagrees with their political beliefs.

The Court: Objection sustained.

Mr. McTernan: I offer to prove that if the witness were permitted to answer, his answer would be yes.

The Court: His answer would be "yes" to what?

Mr. McTernan: That the witness Brodsky and Blair were called back before the grand jury again on December 15, 1948.

I asked him, if your Honor will recall, if it isn't a fact that they were called back on that date.

Q. Isn't it a fact that Brodsky, Blair and Caress were [48] summoned back before the grand jury on another date in the month of December following December 15, 1948?

Mr. Carter: Same objection as made to the previous question.

The Court: Same ruling.

Mr. McTernan: I offer to prove if the witness were allowed to answer the question his answer would be yes.

The Court: Well, Brodsky and Blair are here. You can put them on the stand.

Mr. McTernan: I didn't know your Honor was sustaining the objection on that ground. I thought your Honor was sustaining the objection on the ground that the matter was immaterial.

(Testimony of James M. Carter.)

The Court: In connection with your offer of proof. You say you offer to prove that this witness' answer would be yes.

Mr. McTernan: I am entitled to select my own witnesses, and they are witnesses under charge and are entitled to select their own witnesses. If I have a competent witness to answer the question, that is all I need, as I understand it.

The Court: Objection sustained.

By Mr. Ternan:

Q. Isn't it a fact that the witnesses Brodsky, Blair and Caress were recalled before the grand jury on or about January 3, 1949? [49]

Mr. Carter: Same objection as heretofore made.

The Court: Same ruling.

Mr. McTernan: I offer to prove that if the witness were permitted to answer his answer would be yes.

Q. Isn't it a fact, Mr. Carter, that the three witnesses, Brodsky, Blair and Caress, were ordered back before the grand jury on or about January 12, 1949?

Mr. Carter: Same objection.

The Court: Same ruling.

Mr. McTernan: I offer to prove that if the witness were permitted to answer his answer would be yes.

Q. Isn't it a fact, Mr. Carter——

The Court: Let me ask you: Is it your purpose by this testimony to show that they appeared and testified on these different dates?

(Testimony of James M. Carter.)

Mr. McTernan: I don't know what your Honor means by "testify." On some of these occasions they were called in and simply told to return, and on other occasions they were called in and asked questions, to which they gave responses similar to those which have been read into the record here this morning.

The Court: These are the dates that they were called in with the dates that were read in the record here this morning to answer questions. Is it your position, and you are offering to prove, that these witnesses appeared before [50] the grand jury and gave testimony and aid in this investigation on these dates?

Mr. McTernan: No, indeed, it is not, your Honor.

The Court: I see.

Mr. McTernan: My purpose is to show that this government has caused these people to be called back time and time again without any——

The Court: You said that before.

Mr. McTernan: ——without any object of furthering the inquiry but simply to harass a witness and apply the law discriminatorily against him.

Mr. Carter: May the record show, which the court can take judicial notice of, that the three witnesses which counsel is referring to, that each of them were arrested upon bench warrants that were issued by this court after efforts had been made to serve subpoenas upon them, and then consid-

(Testimony of James M. Carter.)

erable delay occurred from the time of the issuance of the bench warrants to the arrest.

I think also the court should take judicial notice of the fact that there is not only four witnesses before the grand jury, that the grand jury can only question one witness at a time, and that it is therefore obvious that on certain days certain witnesses might have to be excused to other days.

I think the court can take judicial notice of those matters. [51]

The Court: I can take judicial notice of the records and files of the court here, and also the grand jury reports which came down on these different days which involved in some cases as many as 50 and 60 indictments and presentments of other matters.

Mr. McTernan: We are only trying one case here. We are not raising questions on all the other witnesses or cases before the grand jury. Too bad the grand jury didn't confine itself to violations of law instead of trying to use its procedures to discriminatorily annoy people because they disagree with their political beliefs.

The Court: The court will make that determination.

Q. (By Mr. McTernan): It is a fact, Mr. Carter, that one time during the month of January, 1949, these witnesses were called to appear before the grand jury and you didn't even have the grand jury present? Isn't that right? You sent them back and told them to return at another time?

(Testimony of James M. Carter.)

Mr. Carter: Objected to upon the same grounds as heretofore stated.

The Court: It looks to me like it is immaterial. They were ordered to return from time to time, they were all under bond, bench warrants had been issued for them. I do not know how else it could have been handled. It is immaterial anyhow. [52]

Mr. McTernan: Another way it could have been handled was not to even have started a proceeding of this kind.

The Court: Yes, and another way it could have been handled was for them to have answered the questions. They are the ones who chose not to answer the questions and put themselves in the position of seeking to invoke the court's process.

Proceed.

Q. (By Mr. McTernan): Now it is a fact, is it not, that these three witnesses, Blair, Brodsky and Caress, were ordered to appear before the grand jury on or about February 11, 1949?

Mr. Carter: Same objection as heretofore made.

The Court: Same ruling.

Mr. McTernan: I offer to prove if the witness were permitted to answer, his answer would be yes.

The Court: Were not some of the dates read into the record here?

Mr. McTernan: I think so.

The Court: That was Brodsky, Blair and Caress.

Mr. McTernan: I think they were all at the grand jury on February 11th.

(Testimony of James M. Carter.)

The Court: The testimony that was read was the testimony taken this morning.

The Witness: Yes. [53]

The Court: Except as to Doran and Bock. And that was on what date?

The Witness: That was January 12th, Bock and Doran.

The Court: Very well.

Mr. McTernan: I am not sure of the state of the record. Was there an objection to my last question?

The Court: Yes. Mr. Carter objected and I sustained it.

Mr. McTernan: I offer to prove if the witness were permitted to answer, his answer would be yes.

Q. It is a fact, is it not, Mr. Carter, that the same three witnesses were called back before the grand jury on February 18, 1949?

Mr. Carter: Same objection, if the court please.

The Court: Same ruling.

Mr. McTernan: I offer to prove that if permitted to answer the witness' answer would be yes.

Q. That on the same day, February 18th, these three same witnesses were also hailed before the court, were they not, on your motion and order of the court to compel them to answer?

A. I think the record will show they were in this court on February 18th. The minutes will show that.

The Court: Whatever the record shows, it will show. [54]

(Testimony of James M. Carter.)

Q. (By Mr. McTernan): And that proceeding was continued to February 23, 1949, at which time the witnesses were again before the court and the court issued an order compelling them to answer?

A. I don't know whether you asked for a continuance on the 18th or whether the court was busy on the 18th.

Q. In any event, there was a continuance?

A. Yes.

Q. It was continued over to February 23rd?

A. Yes.

The Court: If Mr. McTernan did not ask for a continuance, it is just one time he must have forgotten.

Mr. McTernan: Well, both the witnesses and their counsel have frequently appeared here at times when the court was unable to hear them, and that begins with October 25, 1948, and goes forward. Many times, even while witnesses were in jail, the court was unable to hear counsels' motions and matters had to go over while the witnesses remained in jail.

Mr. Carter: I object to that remark and move it be stricken. I think the court has been very considerate in taking these matters up out of turn.

The Court: Proceed.

Q. (By Mr. McTernan): Mr. Carter, in one of the questions presented in connection with the witness Doran this morning there was a reference to a Ned Sparks. What Ned Sparks was referred to in your question?

(Testimony of James M. Carter.)

Mr. Carter: I object to that upon the ground that the question calls for facts or information that might be within the knowledge of the prosecutor for this district. He is not required to divulge what information he might have in connection with cases that are being investigated. In fact, the questions, some of them, were directed as to who this Ned Sparks was.

Mr. McTernan: May I state my purpose in connection with that?

The Court: There is a motion picture character known as Ned Sparks. I think that your record should probably show whether or not you intended to mean the actor Ned Sparks.

The Witness: I was referring to the actor Ned Sparks.

Mr. McTernan: May I state my purpose, your Honor?

The Court: Yes.

Mr. McTernan: Ned Sparks, your Honor, is a fairly common name. We are seeking to inquire whether the Ned Sparks to which Mr. Carter referred in his answer is the Ned Sparks that was known to be county chairman of the Los Angeles County Communist Party because we wish this information in the record to provide a portion of the setting in which the claim of the privilege against self-incrimination may be evaluated [56] if, in fact, Mr. Carter referred to that Ned Sparks, and

(Testimony of James M. Carter.)

I think he did, answers which would disclose on the part of witnesses that they know him in the sense that they may testify in a court of law of such knowledge, this would serve to tie them in or provide a link in a chain of evidence tying them in with the Communist Party and therefore subject them to the risk of prosecution under the Smith Act, prosecutions similar to which are already in process in New York.

The Court: On all of the grounds you have heretofore stated?

Mr. McTernan: What?

The Court: I am just trying to save you time. You have already stated all of those things.

Mr. McTernan: Perhaps I have. This is something that is before your Honor for adjudication right now and I want my purpose abundantly clear so there will be no misunderstanding.

The Court: The objection is sustained. [57]

* * * *

Direct Examination (Continued)

By Mr. McTernan:

Q. Mr. Carter, who was the Ned Sparks to which you referred in the question that was put to Lillian Doran?

Mr. Carter: I object upon the ground that it is incompetent, irrelevant and immaterial, calls for information in the possession of the prosecutor which he is not required to divulge, privilege information.

The Court: Objection sustained. That is what

(Testimony of James M. Carter.)

he had [61] the witnesses there for, to find out if they knew Ned Sparks.

Mr. McTernan: We are asking what Ned Sparks he referred to.

The Court: I understand. Go ahead.

Q. (By Mr. Ternan): It is a fact, is it not, Mr. Carter, that the Ned Sparks you refer to is the Ned Sparks who is chairman of the Los Angeles County Communist Party?

Mr. Carter: Same objection and upon the same grounds.

The Court: Same ruling.

Mr. McTernan: I offer to prove if the witness were permitted to answer, his answer would be yes.

Mr. Carter: I object upon the further ground to this line of questions that it is already in the record in some of the proceedings which have been incorporated by the stipulation. [62]

* * * *

Q. The information has been presented to the grand jury in the course of this investigation, has it not, Mr. Carter, to the effect that Ned Sparks is the chairman of the Los Angeles County Communist Party?

Mr. Carter: I object to that upon the same grounds heretofore stated, and upon the further ground that the proceedings of the grand jury are secret.

The Court: Objection sustained.

(Testimony of James M. Carter.)

Mr. McTernan: I offer to prove that if the witness were permitted to answer, his answer would be yes.

Q. The Ned Sparks you refer to in your questions to Lillian Doran is also known as Nemmy Sparks, is he not?

Mr. Carter: Same objection.

The Court: Same ruling.

Mr. McTernan: I offer to prove that if the witness were permitted to answer, his answer would be yes.

Q. Now, Mr. Carter, in the course of the criminal proceedings against Messrs. Dobbs, Kasinowitz and Steinberg you gave certain testimony to the effect that the questions put to them were part of an inquiry into alleged false statements by government employees under 18 USC 1001, and that for [63] the purpose of the grand jury's investigation you wished to ascertain from those witnesses the whereabouts of the membership records of the Los Angeles County Communist Party so that you could obtain them and prove whether or not certain government employees were members of the Communist Party.

Now the same testimony that you gave in that proceeding also applies, does it not, to the questions that were put to Lillian Doran and Phil Bock which were presented here to the court this morning in this proceeding?

A. I have already stipulated that that entire

(Testimony of James M. Carter.)

record is part of this record. I take it that was the purpose of the stipulation.

Q. Your answer to my question is generally yes, is that right?

The Court: His answer speaks for itself, and so does the stipulation.

Q. (By Mr. McTernan): You have information to the effect that Ned Sparks and Nemmy Sparks are one and the same person and that that person was the chairman of the Los Angeles County Communist Party, do you not?

Mr. Carter: Same objection as heretofore made.

The Court: Same ruling.

Mr. McTernan: I offer to prove if the witness were permitted to answer that his answer would be yes. [64]

I have no further questions of the witness in view of the court's ruling.

* * * *

Mr. McTernan: Your Honor, certain of the questions presented [65] this morning relate to Elizabeth Glenn and Julia Houdek. We ask that the court take judicial notice of the fact that it has issued bench warrants for the arrest of both of these women and that one of them, the Houdek bench warrant, was the one that was recalled this morning.

May the record at this point show that such warrants had issued, the date of them and the number of the proceeding in which the warrants were issued.

The Court: What has the Houdek matter to do with this matter?

Mr. McTernan: One of the questions I believe, your Honor, was, do you know Julia Houdek.

The Court: Yes, that is right. You want the record in Lillian Doran also?

Mr. Carter: Elizabeth Glenn he suggested as the other one.

Mr. McTernan: The two individuals, it seems to me, your Honor, that there are questions against the witness Blair, do you know Elizabeth Glenn and do you know Mrs. Houdek?

The Court: Elizabeth Glenn is file 8869 Civil. Motion for issuance of a bench warrant filed November 12, 1948, with its supporting affidavits.

There is nothing here indicated in the file as to what happened.

The Clerk: They haven't made a return. [66]

* * * *

The Court: As to Elizabeth Glenn, that was November 12th, and this would indicate its filing November 9. I take it that a bench warrant was issued on the same day.

The bench warrant was ordered issued on November 12 for Elizabeth Glenn. That is all I know about it. It was issued.

Mr. McTernan: Was the bench warrant issued for Julia Houdek on the same date, your Honor?

The Court: That is file No. 8838.

The Clerk: November 9.

The Court: The same day it was filed, November 9. And bench warrant for Mrs. Houdek is recalled this morning, and bench warrant as to Elizabeth Glenn has not yet been recalled.

Mr. McTernan: I think the record should show, your Honor, [67] that the bench warrant for Mrs. Houdek was recalled this morning after the witness had appeared before the grand jury and had returned here for the presentment by Mr. Carter.

The Court: It does not make any difference. I do not see how that can possibly affect it, if it was recalled.

Mr. McTernan: I think that is the fact.

The Court: It was recalled because Mr. Carter advised me yesterday that he intended to move today for its recall. [68]

* * * *

Mr. McTernan: Your Honor, this reminds me that I neglected to offer one item of evidence that I had intended to offer. In the application for bench warrant for both Elizabeth Glenn and Julia Houdek there is a statement by Mr. Carter, which I believe is made under oath——

The Court: Just to make it complete we will by reference incorporate the entire file in No. 8796, Lillian Doran, 8827, Phillip Bock—or is that a bench warrant?

Mr. McTernan: Neither of those is a bench warrant.

The Court: Neither of those?

Mr. McTernan: I don't think so, your Honor.

The Court: That is right.

8874, the entire file for bench warrant for Merle Brodsky will be part of the record in this case.

8842, the entire file for a bench warrant for Robert Blair.

8839, the entire file for a bench warrant for Irving Caress. [73]

8838, the entire file for a bench warrant for Julia Houdek.

Was there not a bench warrant for some others, Elizabeth Glenn, Frank Spector, Mr. Clerk?

The Clerk: There is no number for Frank Spector as yet.

Mr. Carter: There is one other that is involved, and that is the file involving Elizabeth Glenn.

Mr. McTernan: There were a number of other bench warrants issued on virtually the same application.

Mr. Carter: That is right.

The Court: You are only concerned with the bench warrants here now with these people and not with the one for Elizabeth Glenn.

Mr. Carter: That is No. 8869.

The Court: The entire file is Case 8869, proceedings for a bench warrant for Elizabeth Glenn.

Mr. McTernan: May I have one of those?

(The file referred to was passed to counsel.)

Mr. McTernan: Further I believe Mr. Carter will stipulate that in each of those cases which

your Honor has just referred to there was an application for bench warrant signed by himself and Mr. Goldschein which, except for the language designating the witness and the number of the case, were identical in language.

Is that correct, Mr. Carter? [74]

Mr. Carter: That is correct. That particular affidavit is in the record, however.

The Court: Each one had different affidavits attached to it. As I remember, there was a mimeographed affidavit which was the basis, and then it had attached to it in the file different affidavits relating to the effort to serve that particular person.

Mr. McTernan: That is right, your Honor. And the matter about which I asked Mr. Carter to stipulate, which I understand he has stipulated, is that the motion for issuance of bench warrant was in each case the same except for the language giving the name of the witness and the number of the case.

I want to direct your Honor's attention to the paragraph at the top of the second page of that motion reading as follows:

"Said motion is based upon the further ground that said witness is deliberately avoiding service of subpoena and is deliberately impeding the administration of justice and the functioning of the grand jury of this district; on the further ground that various witnesses for whom subpoenas have been issued for appearance before this grand jury

have been following a common course of conduct in avoiding service and impeding the functioning of [75] said grand jury.”

Now this language applies at least, your Honor, to Elizabeth Glenn and Julia Houdek and Dorothy Healy. While this record does not show that a bench warrant was issued for Dorothy Healy, it does show statements by Mr. Carter to the effect that several subpoenas have been issued for Dorothy Healy. And Mr. Carter I believe at one point in the proceedings on February 23rd included Dorothy Healy in this colorful language of his, describing the conduct referred to in the motion for a bench warrant as an “Operation Get Lost.”

Now clearly the purpose and effect of answers to the questions, do you know Dorothy Healy, and all these other questions going into the details of her life and the questions, do you know Elizabeth Glenn, do you know Julia Houdek, must of necessity, if the answers be in the affirmative, tie the witness in with the very conspiracy to impede and obstruct justice, itself a crime, which Mr. Carter has charged against at least the three people I have named, Healy, Glenn and Houdek, as well as many others for whom bench warrants have been issued or subpoenas issued.

So that in addition to the claim of the privilege against self-incrimination under the Smith Act, we submit that the evidence here fully establishes a setting in which it would be extremely dangerous to answer these questions because of the possibil-

ity that they might be tied in with this [76] conspiracy to obstruct justice which has been charged by the United States Attorney.

* * * *

The Court: They need not have been required to have posted anything. I fixed those bonds and I fixed them in [77] that amount because, as I stated at the time, their names were in the papers, it was a notorious fact that the investigating was going on, and made more notorious by many of the people probably who are in the courtroom here today conducting a picket line and picket lines at various times, and their names were in the paper and all they need to have done not to be under \$1000 or \$2500 or \$4000 bond was to have appeared before the grand jury in response to the subpoena, or made themselves available as witnesses.

They could still have insisted upon the preservation of their rights as the other witnesses did in this case who were served and who did appear. [78]

* * * *

Mr. McTernan: The facts presented in this record also, your Honor, in addition to the facts which were available to you on October 25th, clearly point out also the contention which we made at that time that this proceeding denied these witnesses due process of law in that it denied them equal protection of the law. We didn't have available at that time the statement by a high, but unnamed, officer in the Department of Justice that the Administration had found a new way to put the Communists out of business.

Mr. Carter: Just a minute. I thought we had settled all that before. With counsel's own showing we had that settled. [81]

The Court: You do not have that available now. All you have is a newspaper article.

Mr. McTernan: I have available the evidence which this court rejected and I think I have the right to point to it in summing up my case.

The Court: It is not in evidence.

Mr. Carter: You are misstating it, counsel.

Mr. McTernan: I have not said it is in evidence. I know practically everything that has been offered in defense of these people has been rejected, either because it is supposed to be confidential information in the hands of Mr. Carter or because Mr. Carter thinks it is immaterial. But this is all I have to argue to the court, the kind of showing that we would like to make to you.

The Court: You confine your argument to the matters and things which are in evidence, Mr. McTernan.

Mr. Carter: My objection goes further, whether it is in evidence or offered for identification, he is misstating the facts contained in that article. The article states that some person connected with the Un-American Activities Committee made the statement. It doesn't even go so far as to say some official of the Department of Justice said that.

The Court: Let us confine ourselves to the evidence. Proceed. [82]

* * * *

Mr. Carter: May I be heard briefly?

The Court: Yes.

Mr. Carter: First, if the court please, may I observe that many of Mr. McTernan's remarks could have been probably more fitting had he turned his back to the court and talked to the people in the courtroom. Much of this, I think, is far from the mark.

No. 1. What is the effect of this appeal? Let us assume that you filed an indictment against a man for robbing a bank and he was convicted and took an appeal. Does that mean that you suspend all prosecutions of that particular type of case?

The Court: Suppose he went out and robbed another bank while it was on appeal?

Mr. Carter: That is right. There is no particular reason why because an Appellate Court has this question that we should suspend operations. As a matter of fact, we have to extend the term of this grand jury because it was going on and there was yet no decision from the court.

No. 2. I submit he has made no showing tying in these witnesses with the thing that he purports to fear because he argues that association or knowledge of who certain people [91] are about whom these witnesses were interrogated would, in substance, prove that they are members of the Communist Party. I don't think that that conclusion follows at all.

For instance, a person might have information about the Communist Party by having been a member at one time in the past and no longer a member. He might have information because he had been an informer. He might have information because he was an investigator who had made a business of knowing those facts. Or he might have stumbled accidentally on this information. There are many alternatives whereby a person could have the information without necessarily being a member of that party.

Now let me give you an example. Supposing we had a prosecution for the Smith Act on in this court, and I was attempting to prove the elements of the Smith Act, namely, that the defendant had joined an organization which advocated the overthrow of the government by force and violence—we will call it X Organization—and that he was a member thereof, and that at the time he became a member he knew the purposes of that organization. So I called a witness to the stand, and I say to the witness, “Do you know X, the defendant in this case?”

“Yes, I do.”

“Did you ever have a conversation with Mr. X?”

“Yes, I did.” [92]

“Where was it?” Et cetera. All right.

“In that conversation with Mr. X, did he ever tell you that he knew A, B and C, who were members of X Organization?”

I think a court would sustain an objection to that question on the ground that it didn't prove anything. The mere fact that you knew that a certain person belonged to a club or an organization is no evidentiary showing that you yourself are a member of that group.

No. 3. These questions were all preliminary questions. This grand jury was stopped on the threshold of its inquiry. The questions were in most cases, do you know. The answer would have been yes or no. I submit that no proper objection could have been made until the next question followed. If the answer was yes, that you knew, all right, what is it, and then I think the objection, whether good or not, would have been timely. Certainly these objections were not timely.

Finally, let me point out to you that if the court compels witnesses to answer questions in the furtherance of the grand jury investigation the witness is not hurt because if he did have a valid claim to refuse to answer and is compelled by the court, by the processes of the court, to answer the questions he immediately obtains immunity from this fearful thing that he fears, a prosecution under the Smith Act, because by compulsion of the court he is required to testify ipso facto and automatically he obtains an immunity therefrom. [93]

If, on the other hand, his contention was not a valid one then he should be coerced into answering the question.

So either way you look at the matter, the wit-

ness is not hurt. If these witnesses are so fearful of a prosecution under the Smith Act, then by answering these questions under the power of this court they have gained immunity from that prosecution. I think under the McNabb case the Anderson case, where even a lapse of time occurred before arraignment, it invalidates the admissions and certainly anything told the grand jury under the coercive powers of this court could never be used against those people.

These witnesses as a result of a plan, acting together in concert, have determined to impede the process of this grand jury, to prevent this grand jury from finding out anything, and the investigation has been stopped upon the threshold of their inquiry by their activity.

The Court: The situation, while it has proceeded further than it had been on October 2th last year, is essentially and basically no different. I cannot see how any fact or thing before this court which has been adduced here, or any argument or law or case or reason has been advanced, to sustain the objection of these witnesses in their refusal to answer the questions on the ground that it might incriminate them, and for violation of their rights under the [94] First Amendment.

Counsel made five points, the abuse of process was No. 1, and violation of due process No. 2, equal protection—they seem to merge together. It was against the dignity of the court to do this.

I cannot see anything to his point at all. The grand jury is regularly constituted, it is their duty to inquire into possible violations of the law. Likewise it is the duty of the United States Attorney and the Attorney General of the United States to inquire into violations of the law. People owe a duty as citizens to testify and to furnish information. If everybody could refuse to do that it would not be long before you would not have any government, you would not have any Constitution, and you would not have any of these rights with which Mr. McTernan seems to be so endeared.

On the third point, the grand jury, I have already ruled that a witness cannot challenge the grand jury. But in addition to that I want to call counsel's attention to the memorandum which I wrote, and which is reported in 7 F. Supp. 782. Then there was a stipulation that if the witnesses were called here that were called there, their testimony would be the same and that the procedure would be the same. So in the first place I hold that a witness cannot challenge the grand jury and, in the second place, if they could the grand jury is not subject to the challenge indicated by Mr. [95] McTernan.

The last two grounds, it is a little difficult to follow, counsel. I have tried to do so in each of the arguments. It seems one moment that they are afraid they will incriminate themselves because they will disclose a violation of the Smith Act which prohibits the advocacy of the doctrine of overthrow-

ing the government by force and violence, and it seems as though the next moment they are insisting upon their rights because it is a political party. It is inconceivable to me that any political party was contemplated to be allowed to exist by the Constitution that had for its purpose the destruction of that Constitution and the government by force and violence.

On the matter of the incrimination, the position of the defendants seems to be that they say they are not admitting that if they answered the question that they might show guilt under the Smith Act, but they are afraid that they might be accused under the Smith Act. I think the matter of incrimination does not go to a disclosure of anything which might lead to a possible wrongful prosecution, but the matter of whether or not a person can refuse to answer a question on the ground he might incriminate himself is that it discloses some thing which shows that he has committed a crime or discloses something which would tend to indicate that he did actually commit a crime. Now applying that here, their refusal [96] would indicate that they are afraid that it would disclose that they do actually advocate the overthrow of the government by force and violence. But Mr. McTernan disclaims that.

Now on the matter of obstruction of justice, a rather novel way to frustrate completely the processes of government in the investigation of a prosecution of crime results in starting an investigation

and then everybody connected with it and all possible witnesses joining together to obstruct it, and then they are called to refuse to answer on the ground that they are therefore committing a crime. It just is not logical and is almost verging on the point of being ridiculous, as do a great many of the statements which Mr. McTernan has urged in this court.

Now on the First Amendment, they say they have the right of free speech. I think that I have heretofore indicated in opinions which I have written and decisions which I have made that I regard the First Amendment as a very precious one. But I do not think that the founders of the Constitution ever intended that the First Amendment should be a scabbard to hold a sword and conceal it with which the entire structure of the government could be stabbed and thus killed violently. The First Amendment was intended to give free expression of ideas and not intended to hide conduct which would endanger or destroy the government violently.

I cannot help but have recurrence to John Marshall's [97] statement in *Gibbons v. Ogden* and apply it to some of the argument which Mr. McTernan has made here about the Constitution:

“Powerful and ingenious minds * * * may, by a course of well-digested, but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look

at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles, which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived.

The whole situation here in my mind, if counsel for the defendants is correct, would result in the total destruction of government.

I think the case of *In Re Willie* is still the law. All of these questions here are questions, do you know, and I cannot see any exception to any of them. I thought for a while that perhaps the questions, do you know Elizabeth Glenn, or do you know Julia Houdek, in connection with the obstruction of justice might be justified, but on further consideration I cannot see it.

The order of the court will be—if each of the defendants will arise, please—that Mr. Irving Carress is [98] found guilty of civil contempt, that Mr. Robert Blair is found guilty of civil contempt, that Mr. Merle Brodsky is found guilty of civil contempt, that Mr. Frank Spector is found guilty of civil contempt, that Mr. Phillip Bock is found guilty of civil contempt, and that Mrs. Lillian Doran is found guilty of civil contempt.

The sentence and the imposition of sentence will be deferred until—the other matters were continued to March 21st?

Mr. Carter: Could we have some date other than March 21st and dispose of this matter before or

after that date? I let that date be set last time we were in court, but it is a very inconvenient date to my calendar. I would like to either advance the date of sentence of the three other persons to some time this following week or put it past the 25th of March, one or the other.

The Court: The matter of the sentence of these persons then is set for the 28th of March. Is it agreeable that I vacate the order setting it for March 21st and likewise set those for the 28th?

Mr. McTernan: That will be agreeable.

The Court: In the absence of the defendants?

Mr. McTernan: So stipulated.

The Court: And you will produce them, that is to say, Steinberg, Kasinowitz and Dobbs? [99]

Mr. McTernan: Yes, your Honor.

The Court: That will be the order of the court.

The defendants are ordered and directed to return at that time, March 28th, at the hour of 2:00 o'clock p.m., on that day. And that will be the time that the matter of Steinberg, Kasinowitz and Dobbs is set for now. March 28th at 2:00 o'clock p.m.

[Endorsed]: Filed April 6, 1949. [100]

In the District Court of the United States in and for
the Southern District of California,
Central Division

Honorable Peirson M. Hall, Judge Presiding.

Nos. 8796-PH, 8827-PH, 8839-PH, 8842-PH,
8874-PH, 9321-PH

In Re: LILLIAN ADELE DORAN, PHILLIP
BOCK, IRVING CARESS, ROBERT BLAIR,
MERLE BRODSKY and FRANK SPECTOR.

Nos. 20403, 20404, 20405—Criminal

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAMUEL HARRY KASINOWITZ, HENRY
STEINBERG and BEN DOBBS,
Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
March 28, 1949

Appearances: For the Government: James M.
Carter, United States Attorney, Los Angeles 12,
California; and [2*] Ernest A. Tolin, Assistant
United States Attorney.

For the Respondents and Defendants: Margo-
lis & McTernan, 112 West Ninth Street, Los An-
geles 15, California; by Ben Margolis, Esq.; and
Esther Shandler. Amicus Curiae: A. L. Wrin, Esq.,

* Page numbering appearing at foot of page of original certified
Reporter's Transcript.

416 Douglas Building, Los Angeles 12, California.

* * * *

The Court: Samuel Harry Kasinowitz, come forward.

This is the time set for sentence on the matter of criminal contempt of which you have heretofore been found guilty. The matter was referred to the Probation Office. I have received a report—I received it some time ago—it was originally set for sentence I believe on January 17th and has been continued from time to time, and the defendant—excuse me. Have you had no opportunity to consult with your counsel before this?

Mr. Margolis: He has been working, your Honor.

The Court: Have you had no opportunity to consult your [6] counsel since you were convicted?

Mr. Margolis: He has had opportunity.

Mr. Kasinowitz: Yes, I have.

The Court: Very well. I think you might take your hands out of your pockets, sir.

Do you have anything to say in connection with the matter other than what has already been said? Do you have anything to say, Mr. Kasinowitz?

Mr. Kasinowitz: Yes, sir. I would like to make a statement.

The Court: Very well. [7]

* * * *

Mr. Margolis: Your Honor was here, that is correct.

But nevertheless with that record before them three judges, two of them not writing an opinion and one writing an opinion, three out of the six

hearing it, have voted to reverse the judgment, and, in effect, have sustained the position of these defendants.

I want to advise the court that with respect to the matters now pending in the Court of Appeals we intend to petition for a rehearing, and if that is denied we intend to petition to the Supreme Court of the United States for certiorari. Under these circumstances, and if this language that I have read to your Honor from the case of *United States v. Johnson* is meaningful—and I think that it is—the only alternative that these people have, if they want to defend their rights under the Constitution, what they believe to be their rights under the Constitution, is to persist in their position until there is a decision by the highest court having authority to pass upon this question. [11]

* * * *

Mr. Steinberg, this is the time set for sentence on the [12] criminal contempt proceeding on which there was a verdict of guilty previously I think on January 17th. I put the matter over from time to time because the grand jury has been meeting and you have been advised upon those occasions when you were in court by myself at the time they were meeting, and I have informed the United States Attorney and he so stated in court that he would advise you at other times. The record does not appear to show that you have appeared before the grand jury and answered any of the questions which were theretofore asked of you.

Do you have anything to say now before sentence is imposed?

Mr. Steinberg: Yes, your Honor.

The Court: Very well. [13]

* * * *

Mr. Dobbs.

Mr. Dobbs, this matter is continued until today for the matter of sentence on the judgment heretofore finding you guilty of criminal contempt for your refusal to answer the questions propounded to you before the grand jury. The matter was continued from time to time and over periods when the grand jury was meeting, and I did so in order that you might have an opportunity, if you desired to take it, to appear before the grand jury and answer the questions.

It does not appear that you have done so. Do you have anything to say before the court pronounces judgment?

Mr. Dobbs: I would like, your Honor, to make a short statement.

The Court: Very well. [15]

* * * *

Mr. Bock.

Mr. Bock, this matter was continued until today from March 3rd in order that judgment thereupon entered finding you guilty of civil contempt for refusal to answer questions to the grand jury might be postured today for sentence. Do you have anything to say?

Mr. Bock: Yes, your Honor. [17]

* * * *

The Court: Very well.

Mr. Bock, you have been found guilty of civil contempt and, as I read the decisions of the Supreme Court, having [20] reached that conclusion heretofore there is nothing that has been presented here today which goes to the merits of the subject which I have passed upon and need not reiterate. I am impelled by virtue of the decision in the Penfield case to conclude that I have, in so far as the power of punishment is concerned, only the power to commit you to the custody of the Attorney General until you answer the questions.

It is therefore the judgment and sentence of the court that you be committed to the custody of the Attorney General until you answer the following questions:

Do you know Dorothy Healy?

Do you know the business and home address or home address of Dorothy Healy?

Do you know the occupation of Dorothy Healy?

Do you know whether or not Dorothy Healy is married?

Do you know her husband's name?

Do you know his occupation?

What is his occupation?

You will stand committed. [21]

* * * *

Mr. Caress.

Mr. Caress, the situation with you is similar to that of Mr. Bock. You were previously found guilty of civil contempt for your refusal to answer certain

questions propounded by the grand jury, and the matter was continued until today for sentence.

Do you have anything to say?

Mr. Caress: Yes, your Honor.

The Court: Before sentence is pronounced?

Mr. Caress: Yes, sir. [22]

* * * *

The Court: Very well.

Mr. Caress, as I have heretofore indicated, the court has no discretion in the matter of punishment on civil contempt. You have heretofore been found guilty of it, and it is therefore the judgment and sentence of the court that you be committed to the custody of the Attorney General until you answer [30] before the grand jury the following questions:

Can you tell us the table of organization of the Communist Party of Los Angeles County?

Do you know who in the Los Angeles County Communist Party setup has knowledge of or is in charge of membership?

Do you know Dorothy Healy?

Do you know where she lives?

Do you know where she can be found or located?

Do you know her husband's name?

Do you know his occupation?

Do you know any person in this county who advocates the overthrow of the government of the United States by force and violence?

Do you know any organization in this county which has as its purpose the overthrow of the government by force and violence?

Mr. Caress, you will stand committed to the custody of the marshal.

At the conclusion of the civil contempt matters I will ascertain from the United States Attorney the next meeting date of the grand jury and it is my intention to also make an order that in the event any of the witnesses found guilty of civil contempt desire to testify they will notify the United States Attorney who, within 24 hours from that receipt of that notification, excluding Saturdays and Sundays, will [31] convene the grand jury for the purpose of permitting the defendants to purge themselves of contempt. So if I forget that, will somebody remind me of it?

Mr. Blair.

Mr. Blair, you, like Mr. Bock and Mr. Caress, have heretofore been found guilty of civil contempt for your refusal to answer certain questions before the grand jury after being instructed by the court to do so. The matter was continued until today for sentence.

Do you have anything further to say? [32]

* * * *

The Court: I beg your pardon. I did not hear you.

Mr. Blair, like the ones who have preceded you, I have no alternative except to commit you to the custody of the Attorney General on this matter of civil contempt, and that is now the judgment and sentence of the court, that you be so committed until you answer the following questions before the grand jury:

Do you know the table of organization or who the officials of the Communist Party are?

Do you know who or what officer of the Communist

Party of Los Angeles County is in charge of membership or has knowledge of the membership rolls in this county? [34]

Do you know Dorothy Healy?

Do you know where she can be located or can be found?

Do you know her business or home address?

Do you know her business or occupation?

Do you know what her husband's name is?

Do you know his occupation, her husband's occupation?

Have you seen Dorothy Healy recently?

Do you know any person in the County of Los Angeles who advocates the overthrow of the government of the United States by force and violence?

Do you know any organization in the County of Los Angeles which has the announced purpose of the overthrow of the government of the United States by force and violence?

Do you know Elizabeth Glenn?

Do you know Mrs. Houdek?

You will stand committed.

Mr. Brodsky.

Mr. Brodsky, like Mr. Bock, Mr. Caress and Mr. Blair, you are here convicted of civil contempt for your refusal to answer questions to the grand jury after being instructed to do so by the court. The matter was continued until today for judgment and sentence. That time has now arrived.

Do you have anything to say before the court pronounces judgment?

Mr. Brodsky: Yes, your Honor, I do. [35]

The Court: Mr. Brodsky, as I have indicated to the others, I have no alternative, having found you guilty of civil contempt and having passed on the merits, than to commit you as I did the others.

It is therefore the judgment and sentence of the court that you be committed to the custody of the Attorney General [37] until you answer the following questions:

Do you know and can you tell us the table of organization of the Communist Party of Los Angeles County?

Do you know who in the Communist Party in Los Angeles County is in charge of membership or membership rolls?

Do you know Dorothy Healy?

Do you know what her business or residence address is, or where she can be located?

Do you know her husband's name?

Do you know his—that is, her husband's—business or occupation?

Do you know what her business or occupation is?

Do you know any person in the County of Los Angeles who advocates the overthrow of the government of the United States by force and violence?

Do you know any organization in the County of Los Angeles that has for its purpose the overthrow of the United States government by force and violence?

Who are you an organizer for?

You will stand committed.

Mr. Spector.

Mr. Spector, you are here today for the sentence

on the judgment of civil contempt heretofore found against you by this court. Do you have anything to say?

Mr. Margolis: I wonder if Mr. Carter would like to read [38] the statement before it is read by the witness to see if it has his approval.

Mr. Carter: The witness read very well.

Mr. Spector: I have a copy for Mr. Carter, too.

The Court: You will refrain from your horse-play.

Mr. Spector: I would like to depart from the script for a minute, your Honor, and relate the following: In 1930 myself and seven more people, men, were tried under the criminal syndicalism law in Imperial Valley, in Imperial County, and after a long grueling trial, after four weeks, we were sent to San Quentin and Folsom for the total period each of 42 years. I haven't served that time, as you can see. I spent over a year and a half in San Quentin, and then the appeals court set aside my conviction and, in essence, found that I was not guilty of the charge made against me. But in the meantime I served one and a half years and so did my compatriots, my fellow workers.

What is going to be the case today is that myself and the other defendants in this case are going to stay in jail until the highest court—I have no doubt—will find us not guilty.

Now just two more points, your Honor. I hold that I am not a criminal. This may not be the proper legal term. But to send a guy to jail you send him because

he is supposed to be a criminal. I am not a criminal. [39]

Firstly, throughout this entire case the United States Department of Justice, through Mr. Carter, its local representative, has gone to great pains to give this case the appearance of a routine Federal grand jury investigation, so-called, in ascertaining whether certain Federal employees perjured themselves in the notorious and oppressive loyalty checks. These efforts at creating such a false impression have now fallen flat.

In its place stands out in bold relief the fact that the Department of Justice is using the institutions of the Federal grand jury and the Federal Courts and this court as weapons for the intended destruction of the working class political party—the Communist Party of the U. S. A. These intentions are embodied in this case, as well as in those cases now occurring in New York and Denver, Colorado.

To suit its intended purpose, the Department of Justice has gone down the depths of hypocrisy. In the one in New York it is now trying desperately to throw into jail for long terms eleven Communist leaders for reconstituting the Communist Party in 1945.

On the other hand, the very same Department of Justice attacks my right to refuse to answer questions which, in the light of the New York case, will clearly tend to make a criminal out of me and subject me to the prosecution by the very same Department of Justice and the very same Mr. Carter. In [40] other words, you are damned if you do and damned if you don't.

Secondly, why these efforts to destroy the Communist Party? The reasons, as I see them, are that this party and similar parties in other lands are, in my judgment, and in the judgment of millions of other people, the poor people especially, today the biggest obstacle in the path of American rich and powerful to dominate the entire world as Adolf Hitler tried. And to achieve this domination, these rich and powerful people of our country are willing to plunge the whole world into a third world war, into a third blood bath which, in scope, will ruin our country and many other lands well nigh beyond recovery.

The Communist Party of the U. S. A. today in my opinion is the clearest voice that bespeaks the longings of the war-weary American people, especially the workers who yearn for a peaceful world, for secure jobs that will provide for their loved ones and for genuine traditional American democracy.

That is anathema to big business. Hence the Communist Party must be destroyed. Hence the New York case. Hence the Denver case. Hence our case here today.

Third and last, your Honor, this court has probably read the despicable Jack Tenney dossier on myself. Allow me in a few words to describe myself.

The Court: No, I have not.

Mr. Spector: You haven't? Well, you will. [41]

The Court: Well, I do not know. If it is interesting enough I probably will read it.

Mr. Spector: You can do so if you desire.

Like millions of others who came from foreign lands

to help build this beautiful land, America, I landed here 32 years ago. I made my home in Los Angeles in 1920. My daughter was born here, and so was my grandson. Nearly all these years I have worked at my trade, the building trade, as a union man, a member of the AFL. Time after time I was denied my final citizenship papers, never because of moral turpitude but always because of my activities in labor's behalf.

No matter. I have lived here long enough, worked here hard enough, and sank my roots deep enough to earn my thoughts of America as my adopted land, whose true national interests I defend in this case today.

Like any other normal human being, your Honor, I don't care to go to jail. I would rather go about my own work and be with my family and friends. But, your Honor, first of all and foremost I am an honest man, an honest member of my class, the working class.

I have made my choice today. I will sleep with a clear conscience—in jail—if that is the court's decision. [42]

* * * *

The Court: Mr. Spector, it is the judgment and sentence of the court that you be committed to the custody of the Attorney General until you make answer to the grand jury to the following questions:

Do you know the official organization of the Communist Party of Los Angeles County?

Do you know Dorothy Healy?

Do you know where she can be found or located?

Do you know her husband's name?

Do you know her husband's occupation?

Do you know Dorothy Healy's occupation?

Do you know whether or not Dorothy Healy is married?

You will stand committed to the custody of the marshal.

Lillian Adele Doran.

Mrs. Doran—do you desire time to consult your counsel?

Mr. Margolis: I wonder, could we have a short recess? I haven't had a chance to talk to Mrs. Doran.

The Court: You have had no opportunity to talk with her?

Mr. Margolis: It is 10 minutes after 3:00.

The Court: She has been found guilty since March 3rd.

Mr. Margolis: That is correct, your Honor.

The Court: And her appearance before the grand jury was [43] last November 4th, I believe.

Mr. Margolis: My associate, Mr. McTernan, has been handling this matter, as your Honor knows. He has been called out of town and I took over this matter at pretty much the last moment. He has talked to her. I have not.

The Court: Do you wish time to consult your counsel?

Mrs. Doran: Yes, I do.

Mr. Margolis: I was going to point out that this is almost the time for the afternoon recess. If we could have five minutes, that is all I want.

The Court: Very well. We will have a short recess.

(Short recess.)

The Court: Mrs. Doran, you are here under conviction of civil contempt for refusal to answer questions to the grand jury after being instructed to do so by the court. This is the time set for sentence. Do you have anything to say?

Mrs. Doran: Yes, your Honor.

The Court: Very well. [44]

* * * *

The Court: It is the judgment and sentence of the court, Mrs. Doran, that you be committed to the custody of the Attorney General until you answer the following questions to the grand jury:

Do you know Ned Sparks?

Do you know Dorothy Healy?

Do you know her business or home address?

Do you know her occupation? [45]

Do you know where she can be located?

Do you know whether Dorothy Healy is married?

Do you know her husband's name?

Do you know his occupation?

If you do know his occupation, will you tell us what his occupation is?

You will stand committed.

Now as to Bock, Caress, Blair, Brodsky, Spector and Doran, Mr. Carter, when does the grand jury meet again? On April 21st?

Mr. Carter: April 21st, your Honor.

The Court: The defendants are advised that the grand jury will meet in this building at the regular meeting place on April 21st. If at that time they desire to appear and testify and answer the questions,

for your refusal to answer which you are now committed, you may do so.

If at any time during the period of your commitment you desire to make answers to these questions which you have been ordered to answer to this grand jury, you may advise the United States Attorney in writing, either by yourself or through your counsel, and the United States Attorney will, within 24 hours from the date of receiving that (unless it is received so as to require the grand jury to be here on a Saturday and Sunday) convene the grand jury for the purpose of hearing the answers to the questions by these defendants. [46]

* * * *

The Court: Very well.

On the matter of Kasinowitz, Steinberg and Dobbs, each of you have heretofore been given an opportunity to make a statement and have made your statements.

Is there any legal reason why sentence should not be pronounced other than that already heretofore advanced?

Mr. Margolis: None other than that already advanced.

The Court: Very well. It is the judgment and sentence of the court that you, Samuel Harry Kasinowitz, be committed to the custody of the Attorney General for a period of one year.

It is the judgment and sentence of the court that you, Mr. Henry Steinberg, be committed to the custody of the Attorney General for a period of one year.

It is the judgment and sentence of the court that

you, Mr. Ben Dobbs, be committed to the custody of the Attorney General for a period of one year.

You will stand committed.

That concludes the matter? [47]

Mr. Margolis: I have a number of matters, your Honor, that I would like to take up at this time. First of all, with respect to the criminal cases, I hereby move to vacate and set aside the judgment just announced by the court upon all of the grounds previously urged against said judgments, and in addition upon the ground that the sentence is unreasonable, excessive and constitutes, under all of the circumstances of this case, cruel and unusual punishment in violation of the Constitution.

The Court: Do you wish to be heard, Mr. Carter?

Mr. Carter: I think the discussion and argument in the record which counsel has referred to is sufficient.

The Court: Very well. The motion is denied.

Mr. Margolis: Now, if your Honor please, I wish to first of all make a motion for bail in the criminal cases, that is, in the cases in which your Honor has just imposed the sentence of one year upon each of the three defendants. [48]

* * * *

Mr. Margolis: Your Honor please, Rule 46(a) of the [49] criminal rules for district courts promulgated by this Supreme Court and applicable to this and other district courts, lays down the test—it is Rule 46(a) Subdivision (2)—lays down the test for granting of bail in criminal cases. That test is whether or not a substantial question exists.

Before turning to the question of whether or not a substantial question exists in this particular case, I want to cite to your Honor some of the cases on this point interpreting this rule and the rule which preceded it which had been in effect for many years and which contained the identical or substantially identical language presently embodied in Rule 46(a) (2). [50]

* * * *

If—if—the appeal is sustained there will be ample time to carry into effect the punishment. We firmly believe that the appeal will be sustained and we ask your Honor to admit these three defendants convicted of criminal contempt to bail pending the appeal, and we say to your Honor that we intend to press the appeal with the utmost possible speed.

I also have a motion on the civil matter but I will let that wait.

The Court: Let us get all your motions in at one time.

Mr. Margolis: I will turn now to the civil cases. [68]

* * * *

March 29, 1949

The Court: I have listened with a great deal of interest to the arguments advanced and in the decision of the matter I have taken into consideration particularly the things that Mr. Wirin has urged, but I cannot see, as I indicated to him, how I can escape my responsibility here of making a decision.

The purpose of having judges is to make judgments, to reach conclusions. I do not suppose that

there is any case [135] ever tried but that there might not be a difference of opinion found among lawyers; as a matter of fact, every lawsuit has one lawyer advocating one side and another lawyer advocating the other. They are both sincere, but they both cannot be right. And the function of a judge is to decide between them.

So in this matter here, as I indicated, we have to go back to what the investigation was about. It is entitled: "In the Matter of the Investigation by the Grand Jury Concerning Loyalty of Government Employees, Entitled Miscellaneous Investigation No. 279." It is not concerned with an investigation generally of the Community Party of Los Angeles County or anyplace else.

What occurs in that connection? These witnesses have appeared and have been asked these questions which have been repeated so many times that it would be useless and futile and mere repetition to repeat them here.

Now I have found them guilty and I have sentenced them, three of them on criminal contempt and the remainder of them on civil contempt. The question before me is whether or not, as to the criminal contempt, there is a substantial question.

I am not sure what the measure of a determination of bail in such case as this would be under the civil rules. They make no provisions specifically for bail in civil contempt. The general idea of bail or supersedeas bond, which [136] is the same thing in civil

contempt, is that the one who has had a judgment against him in a lower court shall deposit a sufficient sum of money or otherwise give such security as will make the plaintiff whole, or the other side whole, in the event that he loses on appeal.

Here there is the public interest involved. The grand jury is here. The United States Government is involved, of course, and the grand jury and the courts are a part of the instrumentalities of the government. What measure you would get to find to make the government of the United States or the public interest whole, I do not know.

In any event, it does not seem to me that there is a substantial question concerning a single one of these questions. I have read them over and over and over again, and while I have due regard for the opinion of the divided court on the Court of Appeals, I do not have the benefit of any opinion. I do not know what they divided on, or why. Judge Denman's opinion is not illuminating in any respect whatsoever, and it seemed to me that he proceeded on a false premise in the beginning, not knowingly taken but nevertheless not postured upon the situation as it actually was. So I cannot reach any other conclusion, in view of my convictions and in view of my duty as a judge, than to announce them and that is that the bail is denied. [137]

* * * *

Mr. Margolis: I make a motion, first of all, for a stay and for bail merely pending the time that it will take me to make an application to the Appellate

Court. Nobody can be hurt a great deal by that. If the Appellate Court agrees with your Honor they will be back in jail so soon that nobody can be hurt. On the other hand, if the Appellate Court disagrees then they will not have been in jail needlessly this time.

That is point No. 1. [139]

* * * *

The Court: As to your first motion, it is denied.

* * * *

[Endorsed]: Filed April 6, 1949. [140]

In the United States District Court,
Southern District of California,
Central Division

Honorable Peirson M. Hall, Judge Presiding:

In Re:

No. 8839-PH—IRVING CARESS
No. 8842-PH—ROBERT BLAIR
No. 8874-PH—MERLE BRODSKY
No. Misc.—FRANK SPECTOR

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
February 11, 1949

Appearances: For the Government: James M. Carter, United States Attorney, Los Angeles 12, California; and Ray H. Kinnison, Assistant United States Attorney.

For the Respondents: Gallagher, Margolis, McTernan & Tyre, 112 West Ninth Street, Los Angeles 15, California; by John T. McTernan, Esq.; and Esther Shandler [2*]

Mr. Carter: May it please the court, the grand jury has come into the courtroom and we have a matter to present concerning four witnesses who were interrogated before the grand jury and who refused to answer certain questions, basing their

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

refusal upon the ground that they might incriminate themselves. Your Honor will recall that after this proceeding started apparently some group of people or organization put into effect an "Operation Get Lost," as a result of which some bench warrants were issued. Three of these people are Robert Blair, Irving Caress and Merle Brodsky, who were arrested on bench warrants, and the fourth one is Mr. Frank Spector, upon whom a subpoena was served.

I will call Miss Duffy as a witness.

FRANCES L. DUFFY,

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows: [4]

Direct Examination

By Mr. Carter:

Q. Miss Duff, you are the official court reporter who took some proceedings before the grand jury?

A. I am.

Q. Did you take some proceedings on January 12, 1949? A. I did. [5]

Q. In which these four witnesses whose names have been called were called as witnesses?

A. Yes, sir.

The Court: You were sworn prior to the commencement of the testimony, were you?

The Witness: I was, your Honor.

Q. (By Mr. Carter): And have you prepared a transcript of that proceeding? A. I have.

Q. I show you a transcript purporting to be the

(Testimony of Frances L. Duffy.)

questioning of Merle Brodsky on January 12, 1949, and ask you if that is the transcript that you prepared at that time for the grand jury.

A. (Examining transcript): Yes, it is.

The Court: January 12th?

The Witness: January 12th.

Q. (By Mr. Carter): And is this a copy of the same transcript?

A. (Examining document): Yes, sir.

Mr. Carter: I have certain notes here in the original. Is it satisfactory, Mr. McTernan, that the reporter read from her typed transcript rather than from her original notes?

Mr. McTernan: I have no objection. [6]

Q. (By Mr. Carter): Miss Duffy, will you read us the proceedings before the grand jury on January 12, 1949, concerning Merle Brodsky, the questions asked and the answers given?

A. Mr. Carter said, "Mr. Brodsky," and then the questions.

The Court: Was Mr. Brodsky sworn?

The Witness: Yes, your Honor; he was sworn.

"Q. (By Mr. Carter): Mr. Brodsky, what is your first name, Merle?

"A. That is right.

"Q. Do you go by any other name, other than Merle Brodsky? A. No.

"Q. Is that the name you were born under?

"A. Yes.

"Q. Where do you live?

"A. 4200 Beethoven, Venice, California.

(Testimony of Frances L. Duffy.)

“Q. What is your business or occupation?

“A. I refuse to answer that question on the ground that it might incriminate me.

“Q. By that you mean you are in some illegal business?

“A. I would like to consult my attorney on [7] that question.

“Mr. Carter: Well, we will pass that question for the moment, then.

“Q. (By Mr. Carter): Mr. Brodsky, you are not under investigation by this grand jury.

“This grand jury investigation concerns people who are presently employees of the Federal government.

“Are you presently an employee of the Federal government? A. No.

“Q. And have you been a civilian employee of the Federal government in the last year?

“A. No.

“Mr. Carter: Now, this investigation concerns people who are presently employees of the Federal government. We call them ‘subjects.’ You are not a subject of this investigation; you are called in here as a witness, to give certain testimony.

“Q. (By Mr. Carter): Are you a citizen of this country? A. Yes.

“Q. You know, do you not, as a citizen you owe [8] certain obligations to your government, such as supplying information and giving information within your knowledge to a grand jury, if called as a witness?

(Testimony of Frances L. Duffy.)

“A. May I get a clarification, because you seem to have asked me a question and then defined what a citizen is.

“My clarification is, if I know what it is to be a good citizen, I say ‘Yes.’ I think the Constitution and the Bill of Rights pretty well determines the privileges and outlook of what it means to be a good citizen.

“Q. I didn’t ask you what it meant to be a good citizen. I asked you if you knew that a citizen had certain duties, one of which is to give testimony before a grand jury if called as a witness.

“A. Any question this grand jury asks of me which does not infringe on my constitutional rights I will be glad to answer.

“Q. You understand also you may raise the question of your privilege, but you are not the final judge of that. You understand that, do you?

“A. I am not an attorney. I can’t give——

“Mr. Carter: Let me state what the law is [9] on that, so you won’t be under any misapprehension.

“If a person is asked a question which he thinks might subject him to prosecution by the agency involved, in this case the Federal government, he can refuse to answer.

“If you are asked a question which you think might subject you to prosecution under the laws of the United States, then you can raise the question of privilege, by declining or refusing to answer that question. However, a judge of the Federal

(Testimony of Frances L. Duffy.)

Court then decides whether your claim of privilege which you have made is a good claim; and if he decides that you have not made a good claim, then his decision, if and when it becomes a final decision, is the one that controls. In other words, it is not your decision; it is for the judge to finally determine whether it is a good claim.

“Q. (By Mr. Carter): Do you understand what I have told you?

“A. I understand what you have said.

“Q. All right, going back to this inquiry, we are attempting to develop facts showing evidentiary matter as to whether or not these subjects, [10] these employees of the Federal government, did or did not belong to certain organizations about which they made statements. If they made a false statement, then it would appear that a crime had been committed against the Federal government.

“Do you know and can you tell us the table of organization of the Communist Party of Los Angeles County?

“A. I will have to refuse to answer that on the grounds that it would incriminate me, and, secondly, I think it is an obvious inquiry into my political beliefs and affiliations, which I fear you have no right to do.

“Mr. Carter: Of course that last statement is rather absurd, when I haven't asked you your beliefs, and the question is no different than if I asked you if you knew who the chairman of the Republican Party in this county was. That

(Testimony of Frances L. Duffy.)

wouldn't be any proof at all that you were a Republican.

"The Witness: Well, I think you are in a position, in asserting many of these things—even though you make the assertions, I think that this is an inquiry into my political beliefs and political affiliations.

"The Constitution is very specific on this [11] question. Furthermore, as I say, I feel that—I refuse to answer this on the ground it might incriminate me; that these are rights that are granted and should be adhered to as——

"Q. (By Mr. Carter): What does the Constitution say about that subject? You are referring to something I never heard about.

"A. I would suggest that perhaps the Constitution should be read before the grand jury.

"Q. That might be a good suggestion; but I am asking you what particular provision you are referring to when you talk about your right to political views?

"A. I don't think it is my obligation to refer to that. I think we could have the Bill of Rights, and it would be in there.

"Q. I would be glad to get one, and have you point out the provision you refer to.

"A. I think it is obvious it is not incumbent upon me to point that out.

"Q. Do you know who, in the Communist Party in Los Angeles County, is in charge of membership or membership rolls?

(Testimony of Frances L. Duffy.)

“A. I refuse to answer that question on the [12] ground that it might incriminate me; that it is further again an inquiry into my political beliefs. I feel that you do not have the right to inquire into these. I feel the right of political beliefs of people are their own.

“Q. Do you know Joe E. Brown?

“A. Joe E. Brown, the movie actor?

“Q. Let's say Joe E. Brown, the movie actor. Do you know him?

“A. If you say Joe E. Brown, the movie actor, I don't know him personally. I know of Joe E. Brown, the movie actor.

“Q. You don't think answering that question will incriminate you in any way?

“A. I have answered the question, haven't I? I said I would answer any question this grand jury wanted to ask of me that would not infringe on my political beliefs or not tend to incriminate me.

“Q. Do you know Dorothy Healey?

“A. I refuse to answer that question on the ground it may tend to incriminate me, and further that it is an inquiry into my political beliefs and associations.

“Q. Do you know what her business or residence address is, or where she can be located? [13] Will that incriminate you, also, to answer that?

“A. I am afraid I must answer that question again—so far these questions all seem to cover the same person—that this question would incriminate

(Testimony of Frances L. Duffy.)

me, and again it is an inquiry into political beliefs and affiliations.

“Q. Do you know what her business or occupation is?

“A. If I must repeat, I refuse to answer the question on the ground I believe it would incriminate me; furthermore it is an inquiry into my political beliefs and affiliations.

“Q. Do you know her husband’s name? Is that going to incriminate you also?

“A. I refuse to answer. I hate to be repetitious; I think it is obvious to everyone concerned that these are the same questions.

“I refuse to answer on the ground it may tend to incriminate me; furthermore, an inquiry into political beliefs.

“Q. Do you know his business or occupation?

“A. I refuse to answer on the ground it may tend to incriminate me and inquires into my political beliefs. I will make it shorter.

“Q. Do you know any person in the County of Los Angeles who advocates the overthrow of the Government of the United States by force and violence?

“A. I refuse to answer on the ground it may tend to incriminate me; furthermore, an inquiry into political beliefs and affiliations.

“Q. Do you mean by that you have a political belief advocating the overthrow of the government by force and violence?

“A. I believe it is obviously not incumbent upon

(Testimony of Frances L. Duffy.)

a witness to elaborate or specify on these questions. I have made my answer, and I am further, I repeat, willing to answer any question that does not border on my political beliefs, affiliations or opinions, or tend to incriminate me.

“Q. Do you know any organization in the County of Los Angeles that has for its purpose the overthrow of the United States government by force and violence?

“A. I would like to consult my attorney. I think we are here to find out an answer on these things. I am not a lawyer; I would like some legal advice.”

Q. Just a minute, Miss Duffy. I think you can skip to page 12, line 21.

A. Yes, sir. [15]

“Q. Mr. Brodsky, did you have an opportunity to talk with your counsel?

“A. Yes, I did.

“Q. Did you have ample time to discuss the matter?

“A. Yes, we did. We had time enough to reach a decision.

“Q. One question was, do you know of any organization in the County of Los Angeles which advocates the overthrow of the government of the United States by force and violence?

“A. I am wondering—It also came to my attention there was another question I believe I answered incorrectly, that was asked me before, on what was my occupation.

(Testimony of Frances L. Duffy.)

"I would like to answer that question, then give an answer in whatever order you prefer.

"Q. I have no preferred order. Did you refuse to answer that question?

"A. I believe I did. I would like to answer that now. I am an organizer.

"Q. Who are you an organizer for?

"A. That question I refuse to answer on the ground it might tend to incriminate me.

"Mr. Carter: You are a great disappointment.

"Q. (By Mr. Carter): Will you answer the question whether you know any organization of the County of Los Angeles which has for one of its announced purposes the overthrow of the government of the United States"—the record says "for," and it should be "by"—"by force and violence?"

Mr. McTernan: I am sorry. I didn't hear that.

The Witness: Apparently there is a typographical error in the record. It says "for force and violence," and I am sure he said "by force and violence."

Mr. Carter: Is there any objection to that?

Mr. McTernan: No.

The Witness: I didn't catch it in my reading it over, your Honor.

"A. On advice and after consultation with my counsel, I would like to answer that I refuse to answer that question on the ground it would tend to incriminate me, and it is an obvious inquiry into my political beliefs and associations.

"Q. Do you believe that the Constitution of

(Testimony of Frances L. Duffy.)

the United States, in permitting the claim of privilege, protects against persons who might attempt to overthrow the government by force and violence and destroy the very document which they rely upon? [17]

“A. I might answer by saying I don’t believe it is my job to instruct the grand jury on what the Constitution of the United States says or does not say.”

Mr. Carter: That is sufficient, Miss Duffy. [18]

* * * *

Q. Miss Duffy, on January 12, 1949, did you also take down the testimony of Frank Spector before the grand jury of this district?

A. Yes, sir.

Q. And did you prepare a transcript of Mr. Spector’s testimony? A. Yes, sir.

Q. I ask you if this is the original copy of that transcript.

A. (Examining transcript): Yes, sir.

Q. Is that a copy also?

A. (Examining transcript): This is a carbon copy of that original; yes, sir.

Q. Was Mr. Spector sworn on that occasion as a witness? A. Yes, he was.

Q. Will you read the transcript, commencing on page 2, line 6, of the examination of Mr. Spector?

A. Yes, sir.

“Q. (By Mr. Carter): Your name is Frank Spector? A. Yes, sir. [21]

“Q. Where do you live, Mr. Spector?

(Testimony of Frances L. Duffy.)

“A. 215 South Soto Street.

“Q. Mr. Spector, this grand jury has been investigating the matter involving the loyalty of government employees. You are not an employee of the United States government, are you?

“A. I am not.

“Q. And you have not been, within the last two or three years? A. I have not.

“Q. You are not one of the subjects under investigation; you are not being investigated. Do you understand that?

“A. Will you repeat it again, please?

“Q. You are not one of the subjects that are being investigated; you are not one of those persons that are under investigation.

“A. Not that I know of.

“Q. I am stating that fact to you, for the record. A. Thank you.

“Q. We want certain information from you, and—let me ask you, are you a citizen of this country? A. I am not. [22]

“Q. You owe certain duties to this country—

“A. (Continued): My application is pending for final papers.

“Q. You desire to be a citizen?

“A. Indeed, sir.

“Q. As far as that is concerned, an alien who has not yet obtained citizenship owes certain duties to the government under which he lives.

“A. Yes.

“Q. One of those duties is an obligation to

(Testimony of Frances L. Duffy.)

cooperate with the grand jury when it investigates matters, and supply information if it is within your knowledge to supply that information to the grand jury. You understand that, do you not?

"A. I do.

"Q. Do you know the official organization of the Communist Party of Los Angeles County?

"A. I am going to decline to answer this question, because it will tend to incriminate me, and I know the Constitution of the United States grants certain rights, and under the Fifth Amendment and the First Amendment, I decline to answer this question because it might incriminate me.

"Q. You have publicly stated, on innumerable occasions, in this county, have you not, that you [23] were a member of the Communist Party?

"A. The same answer to the question.

"A Juror: We can't hear.

"The Witness: Same answer.

"Q. (By Mr. Carter): Until this day, when you came before this grand jury, you have never refused to state heretofore that you were a member of the Communist Party, have you?

"A. The same answer as to the last question.

"Q. Do you know Dorothy Healey?

"A. The same as to the last question.

"Q. Do you know where she can be found or located? A. The same answer.

"Q. Do you know any person in this community who advocates the overthrow of the United States government by force and violence?

(Testimony of Frances L. Duffy.)

“A. I don’t, no.

“Q. Do you know of any organization in this community which has for its purpose the overthrow of the government by force and violence?

“A. The same answer that I gave to the question previous to the last one.”

Q. I now ask you to skip to the bottom of page 5, line 26. [24] A. All right.

“Q. I asked you if you knew Dorothy Healey. Do you know her business or home address?

“A. The same answer.

“Q. Do you know her occupation?

“A. The same answer.

“Q. By ‘the same answer’ you mean——

“A. I refuse to answer this question—pardon me, I decline to answer this question on the ground it may incriminate me.

“Q. Do you know where she can be located?

“A. The same answer.

“Q. Refusal upon constitutional grounds, as I understand, is that right?

“A. I decline to answer the question. Do you want me to reformulate it?

“Q. You have given several answers, and when you say ‘the same answer’——

“A. I will repeat, for the benefit of the reporter, I decline to answer the question on the ground it may incriminate me, being a violation of the constitutional rights under the Fifth and the First Amendments.

(Testimony of Frances L. Duffy.)

“Q. Do you know whether or not Dorothy Healey is married? [25] A. Same answer.

“Q. Do you know her husband’s occupation?

“A. Same answer.

“Q. Do you know her husband’s name?

“A. Same answer.”

Mr. Carter: That is sufficient. At this time we move, as to Frank Spector, that the witness’ claim of privilege as to the questions which he refused to answer is not well founded and that the witness should be required by the court to answer those questions before the grand jury.

The Court: Proceed with the other witnesses and then I will hear Mr. McTernan on behalf of the witnesses.

Mr. Carter: I know your Honor has other matters this morning. Shall we stop at this time?

The Court: No. Go ahead.

Q. (By Mr. Carter): Miss Duffy, did you take down as a reporter for the grand jury on January 12, 1949, the testimony of Irving Caress?

A. Yes, I did.

Q. Did you prepare a transcript of Irving Caress’ testimony before the Federal grand jury?

A. Yes, sir.

Q. And you made a transcript, did you, and a copy of that? [26] A. Yes, sir.

Q. Is that the original and a copy?

A. (Examining transcripts): Yes, it is.

Q. Mr. Caress was sworn to tell the truth before the grand jury? A. Yes, he was.

(Testimony of Frances L. Duffy.)

Q. Will you commence reading at page 2, line 26, of that transcript? A. Yes.

“Q. (By Mr. Carter): Mr. Caress, you are not under investigation; we are not investigating you, as a subject of a criminal prosecution. We merely want some information from you.”

The Court: This was January 12th also?

The Witness: Yes, sir.

The Court: All of these were on January 12, 1949?

The Witness: Yes, sir.

The Court: Very well.

The Witness (Continuing): “You are a citizen of this country, are you not? A. Yes.

“Q. You know that you have an obligation, as a citizen, to supply your government with information that it desires? [27]

“A. Yes, sir.

“Mr. Carter: These proceedings before the grand jury are secret, unless you elect to make them public by refusing to answer questions. If you answer questions, the proceedings are secret and are not published. Of course, if you don't answer the questions, then the transcript of what transpired may be read to the court in seeking an order for you to answer the questions. So you can speak freely before the grand jury, and answer these questions, if you so desire.

“For your information, we are investigating cases involving the loyalty of government employees.

(Testimony of Frances L. Duffy.)

“Q. (By Mr. Carter): You have never been an employee of the government?

“A. Excepting during my service in the Army.

“Q. Never been a civilian employee?

“A. No.

“Q. And are not now employed by the government? A. No.

“Q. These cases involve employees who are alleged to have made false statements to an agency of the government in connection with their employment. [28] That is what we are seeking, and all we are interested in. We want to develop information leading to the proof as to whether the statements that these individuals made are true or false. If it turns out that they made truthful statements, then there will be, of course, no further proceeding. If they made false statements, then the grand jury would have the duty of determining whether or not they are to be indicted. I am speaking of the subjects under investigation, not you people who are called as witnesses.

“Can you tell us the table of organization of the Communist Party of the Los Angeles County?

“A. I refuse to answer such question on the ground it might incriminate me, and is an invasion of my rights under the First and Fifth Amendments, and an inquiry into my political beliefs.

“Q. Do you know who in the Los Angeles County Communist Party setup has knowledge of or is in charge of membership?

“A. I refuse to answer on the same grounds.

(Testimony of Frances L. Duffy.)

“Q. Do you know Dorothy Healey?

“A. I have to refuse to answer that on the same grounds.

“Q. Do you know where she lives? [29]

“A. I refuse to answer on the same grounds.

“Q. Do you know where she can be found or located?

“A. I refuse to answer on the same grounds.

“Q. Do you know her husband’s name?

“A. I refuse to answer on the same grounds.

“Q. Do you know his occupation?

“A. I refuse to answer on the same grounds.

“Q. Do you know any person in this county who advocates the overthrow of the government of the United States by force and violence?

“A. I refuse to answer on the same grounds.”

Mr. McTernan: Pardon me. I didn’t hear that.

The Court: Do you know any person in this country who advocates the overthrow of the government of the United States by force and violence.

The Witness: That is right.

The Court: Is that what you said?

The Witness: Yes, your Honor.

Mr. McTernan: Thank you.

The Witness: I will try and talk a little louder.

The answer was: “I refuse to answer on the same grounds.”

“Q. Do you know any organization in this county which has as its purpose the overthrow of the government [30] by force and violence?

“A. I refuse to answer on the same grounds.”

(Testimony of Frances L. Duffy.)

Mr. Carter: That is sufficient.

At this time the government moves that the claim of privilege made by the witness Irving Caress is not well founded and that the witness be required by the court to answer the questions.

The Court: Very well. Proceed. You have one more?

Mr. Carter: Yes, your Honor.

Q. Miss Duffy, on January 12, 1949, did you also take down the testimony of Robert Blair before the grand jury of this district?

A. Yes, sir, I did.

Q. Did you make a transcript of his testimony and a copy? A. Yes, sir.

Q. Will you check to see if that is the original and a copy of the transcript that you prepared?

A. (Examining transcripts): Yes, it is.

Mr. Carter: I take it that the same arrangement that applied to the first witness, Mr. McTernan, applies to the other three, all the witnesses, that we may use the transcript of the testimony rather than the original notes?

Mr. McTernan: We have no objection to that.

Also our motion that we be supplied with a copy of this [31] also?

By Mr. Carter:

Q. Was Mr. Blair sworn as a witness before that grand jury? A. Yes, sir, he was.

Q. Will you begin reading the transcript, page 3, line 14? A. Yes.

“Mr. Carter: Mr. Blair, you are not under in-

(Testimony of Frances L. Duffy.)

vestigation by this grand jury. This grand jury is not investigating you, or attempting to make a case against you, or in any way affect you, except we want certain information.

“The matters before this grand jury concern a series of subjects who are alleged to have made false claims to the government, a series of subjects who are employees of the government and who are alleged to have made false claims or statements to the government or an agency of the government having jurisdiction over the matter.

“Our purpose is to find out whether the statements they made were true or false, and, specifically, to find out whether or not these government employees were members of certain organizations at the time they made these statements. [32]

“Do you understand what I have said to you?

“The Witness: I do.

“Mr. Carter: There has been a lot of propaganda put out, that people are being called before the grand jury to be made stool pigeons of.

“I want to tell you that grand juries, since the days in England where grand juries originated, have called people in and forced them to testify even against friends and relatives; so you have no privilege to stand on if you are trying to protect someone else.

“You understand that statement?

“The Witness: I do.

“Mr. Carter: Now, the Constitution provides that a person is not required to incriminate himself,

(Testimony of Frances L. Duffy.)

and you may raise the claim of privilege. However, do you understand that you are not the final judge of whether your claim of privilege is good, but that some judge finally decides whether it is a valid claim?

“The Witness: I understand that.

“Mr. Carter: I also inform you that the proceedings before the grand jury are secret, that what you say before the grand jury is secret, unless you elect to make it public. In other words, [33] if you testify before us and answer the questions that are asked you, that is secret information. If you decline to testify, of course the proceedings may be read before the court, in an effort to secure an order compelling you to testify. Therefore, if you testify, your testimony will be confidential and will not be divulged.

“Do you understand that?

“The Witness: I do.

“Q. (By Mr. Carter): Now, these government employees that we are concerned with, one of the issues involved, is whether or not they were members of the Communist Party of Los Angeles County; and I would like to ask you if you know of the table of organization, or who the officials of the Communist Party of Los Angeles County are.

“A. I am compelled to answer that I believe that that question would involve a possible self-incrimination, and therefore I refuse to answer; also, on the further ground that it might possibly tend to

(Testimony of Frances L. Duffy.)

inquire into my political beliefs and associations, under the First Amendment.

“Q. Do you know who or what officer of the Communist Party of Los Angeles County is in charge of membership, or has knowledge of the membership [34] rolls in this county?

“A. I must repeat my answer, on the same ground.

“Q. Do you know Dorothy Healey?

“A. I must repeat the same answer again, the same grounds, that it invades my political beliefs and also the right of political belief, as given under the First Amendment.

“Q. We have had a subpoena out for Dorothy Healey. Do you know where she can be located or can be found?

“A. I refuse to answer that question on the same ground.

“Q. Do you know her business or home address?

“A. I refuse to answer that question likewise on the same ground given.

“Q. Do you know her business or occupation?

“A. Likewise I refuse to answer that question for the same reasons.

“Q. Do you know what her husband's name is?

“A. I must repeat again that I refuse to answer that question on the ground of possible self-incrimination, and also the fact that it can't be possibly an inquiry into my own political beliefs and associations. [35]

(Testimony of Frances L. Duffy.)

“Q. Do you know his occupation, her husband’s occupation?

“A. I must repeat the answer as given above to the former question.

“Q. Have you seen Dorothy Healey recently?

“A. Again I must repeat the same answer, on the same grounds as previously stated.

“Q. Supposing I asked you, have you seen Philip Bock recently, what would your answer be?

“A. I would answer ‘Yes.’

“Q. You don’t feel that that would incriminate you? A. No, I don’t.

“Q. Have you seen Henry Steinberg recently?

“A. Yes, I have. I have seen him in the course of this inquiry.

“Q. Do you know Ben Dobbs?

“A. I have seen him in the course of this inquiry.

“Q. Do you know Elizabeth Glenn?”

The Court: Elizabeth who?

The Witness: Glenn, G-l-e-n-n.

“A. I refuse to answer that question likewise on the ground it might incriminate me.

“Q. Do you know Mrs. Houdek? (H-o-u-d-e-k).

“A. I refuse to answer that question likewise on the ground it might incriminate me.

“Q. In other words, if the person has been subpoenaed and subject to subpoena, you have no hesitancy in saying you know him, or have seen him, but if the person has not yet been subpoenaed or ar-

(Testimony of Frances L. Duffy.)

rested by the marshal on a bench warrant, you refuse to answer. Do I draw the proper conclusion?

“A. No, you are drawing the line whether the person has received a subpoena or not. I know, from the conduct of the hearing, if he is likewise one of the witnesses testifying before this inquiry. Any further knowledge or lack of knowledge on my part, I refuse to——

“Q. Do you know Mrs. Sherman?

“A. Mrs. Sherman?

“Q. Yes.

“A. I believe she is one of the witnesses.

“Q. Do you know her?

“A. I know her through this inquiry.

“Q. Do you know Mrs. Forest?

“A. I believe she is one of the witnesses, and likewise I am acquainted with——

“Q. You don't feel answering the question that [37] you know these people would incriminate you?

“A. I feel it would incriminate me if I hadn't known them through the conduct of this trial or hearing.

“Q. In other words, it hinges somewhat on how you know these people, is that the basis of your answer? If you know a person in a certain way you would answer the question, and if you know them in another way, you wouldn't; is that what you are getting at?

“A. No. I think it is knowledge on our part of the way to conduct ourselves on the basis of con-

(Testimony of Frances L. Duffy.)

sultations with attorneys hired to advise us of our constitutional rights; therefore, we have a basis of being acquainted——

“Q. Let’s go back. You admit you know Ben Dobbs?

“A. I know him through this inquiry. Any further knowledge of him I refuse to answer on the ground of self-incrimination.

“Q. Do you know Ben Dobbs?

“A. Through this inquiry.

“Q. You know also, do you not, that Ben Dobbs——”

Mr. Carter: Just a moment. Omit that and go to page 9, [38] line 12.

The Witness: Yes.

“Q. Do you know any person in the County of Los Angeles who advocates the overthrow of the government of the United States by force and violence?

“A. I refuse to answer that question on the same grounds. I feel it is an invasion of my political rights; it is a political question, and an invasion of the First Amendment of the Constitution, and also can lead to self-incrimination.

“Q. Do you know any organization in the County of Los Angeles which has the announced purpose of the overthrow of the government of the United States by force and by violence?

“A. I refuse to answer that likewise on the same grounds.”

Mr. Carter: That is sufficient.

At this time the government moves that the witness be required to answer the questions asked which he refused to answer upon the ground that his claim of privilege is not well founded. [39]

* * * *

Mr. McTernan: I forget where we are now, Mr. Carter. Have you completed your presentment?

Mr. Carter: I have completed my presentation of my motion. The question now is whether you have any valid reason to show that these questions would tend to incriminate these witnesses. [40]

Mr. McTernan: I have a large number.

The Court: Any different than these heretofore advanced in connection with the other matters?

Mr. McTernan: I think they will be. I will have a little trouble straightening out my notes as to what was said, but I am sure that there will be matters which include matters which have already been urged to you and in addition others.

Mr. Carter: There are really only two questions that the government is concerned with, Mr. McTernan and your Honor. The questions are identical with the questions previously asked in other proceedings, as to the table of organization of the Communist Party. There is one question that varies somewhat in that specifically the question asked was, "Do you know who has charge of the membership rolls?" However, that is no major departure from other questions that have been asked.

The two really new questions that are different from other proceedings are the two questions: "Do you know the name of any person in this county who

advocates the overthrow of this government by force and violence?" and "Do you know of any organization in this county that advocates the overthrow of the government by force and violence?"

Three of the witnesses refused to answer that. The witness Frank Spector answered. [41]

The Court: He answered one question. He answered the question that he did not know any person.

Mr. Carter: And I think he also answered that he didn't know any organization.

The Court: No, you did not ask the other question, according to my notes. [42]

* * * *

Los Angeles, California

February 18, 1949; 9:30 o'clock a.m.

The Court: The question is when I will be able to go on with the matter. In the case on trial the government is putting on its case and they said they had four more witnesses. I do not know whether they will finish today or not. I hope they can at least finish the evidence. If that is the case I would have to put this matter over until next Wednesday—Tuesday being Washington's Birthday—and set it then. Is the Grand Jury returning next Wednesday?

Mr. Carter: This Grand Jury is not returning next Wednesday.

The Court: Is there a stipulation on file that the jury need not be present?

Mr. Carter: A letter has been written, which I intend to file with the Court.

The Court: I think perhaps the letter should not

be filed. I think that I will accept Mr. McTernan's oral stipulation.

Mr. McTernan: I have so stipulated with Mr. Carter on the basis of the letter.

The Court: Very well. The minutes will note that there is an oral stipulation that the jury need not be present at this time for the presentation of the matter.

* * * *

Los Angeles, California;

February 23, 1949; 9:30 o'clock a.m.

The Court: I think, Mr. McTernan, probably it would lead to orderly procedure and expedition as well if you would present your defenses, whatever defenses you have, jointly and then whatever distinctions you claim there is between the different questions of the different witnesses, to point that out, so we can proceed as if it were one proceeding. There will be separate orders, however, as to each of the witnesses if orders are made.

Mr. McTernan: Very well. [58]

* * * *

The Court: Mr. McTernan, Mr. Carter has handed up to me what purports to be a verbatim transcript of the testimony before the grand jury on January 12, 1949, of Irving Caress, Robert Blair, Merle Brodsky and Frank Spector. I have read them all the way through.

Is it your desire, on behalf of these defendants and as [70] defensive matter to the request or instructions to answer the questions, that the entire transcripts be put into the record?

Mr. McTernan: It is, your Honor.

The Court: It is so ordered.

Mr. McTernan: Now mechanically, your Honor, how will this be done, simply physically incorporated as exhibits, read into the transcript, or how?

The Court: I do not care. It can be read into the record or filed as exhibits.

Mr. Carter: If you file them as exhibits it will entail less work.

Mr. McTernan: I have no objection to that. I would like an opportunity to examine them now before I go ahead so I may utilize whatever additional material there is in there in addition to what has already been put into this record.

The Court: It does not look to me to be anything but argument between Mr. Carter and the witnesses.

They will be marked as exhibits, Irving Caress as A, Robert Blair as B, Merle Brodsky as C and Frank Spector as D.

(The transcripts referred to were marked Defendants' Exhibits A, B, C and D respectively and received in evidence.)

The Court: Are you through with this witness?

Mr. Carter: I am.

Mr. McTernan: No, I am not, your Honor. [71]

Q. Miss Duffy, at any time on January 12, 1949, or at any other time before the grand jury at which time you were the official reporter, did Mr. Carter or any other representative of the United States Attorney's office ask questions or make statements in which he described Dorothy Healy as the organizing

(Testimony of Frances L. Duffy.)

secretary of the Los Angeles County Communist Party?

Mr. Carter: Objected to upon the ground that the transcripts are now in evidence and they are the best evidence of what transpired, and speak for themselves.

The Court: The objection is sustained.

Mr. McTernan: May I state my purpose?

The Court: I think I can understand your purpose. You stated it I think probably fifteen times.

Mr. McTernan: I simply want to point out that we understand that there is before the grand jury information identifying Dorothy Healy as organizing secretary of the Los Angeles County Communist Party, and that this is a legitimate part of the setting in which the questions were asked these witnesses and is therefore important, material, relevant evidence to be considered by this court in determining whether or not they are compelled to answer the questions.

The Court: The objection is sustained. You are not entitled to have a disclosure of the entire investigation before the grand jury, but only a disclosure relating to the [72] circumstances of these witnesses.

Mr. McTernan: We are only asking for information going to the setting of these witnesses and we submit, under the Zwillman case, which has heretofore been cited to your Honor, that we are entitled to that information.

Q. Miss Duffy, on January 12, or at any other time when you were the official reporter before the

(Testimony of Frances L. Duffy.)

grand jury, did Mr. Carter or any other representative of the United States Attorney's office ask questions or make statements in which Phil Bock was described as youth director of the Los Angeles County Communist Party?

Mr. Carter: Objected to on the ground that the transcript of the examination of these witnesses is the best evidence; that it is incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Any other inquiry than that now before the court as to these questions and these witnesses is immaterial.

By Mr. McTernan:

Q. The same question as to Harry Kasinowitz.

The Court: It is not only immaterial but it would certainly be a frustration of the law for a witness to come in and compel, when he is cited to answer a question whether or not he might be incriminated, the complete disclosure on the part of the government of any investigation that they might make. [73]

Mr. McTernan: We respectfully submit to your Honor—

The Court: It would thwart and make ridiculous the entire processes of the grand jury in a criminal investigation.

Mr. McTernan: We respectfully submit to the court that the ruling which deprives the witnesses of this information frustrates their constitutional rights because they are entitled to have this information in order to show the setting of the questions so

(Testimony of Frances L. Duffy.)

that the peril to them may be explained to the court, and this matter we consider to be settled law in view of the ruling of Judge Hand in the Zwillman case.

The Court: On the other hand it would frustrate and destroy the Constitution if every witness called before a grand jury can do what you are now seeking to do.

Mr. McTernan: We submit that the interests of the grand jury are second to the Constitution.

The Court: It is not the grand jury, it is the country. The grand jury is part of the laws of the land and part of the machinery for maintaining and sustaining the Constitution of the Constitution of the United States.

Mr. McTernan: The Fifth Amendment is part of the law of the land too by which both courts and grand juries are bound, and we submit that those courts and grand juries are required to observe the requirements of these constitutional amendments and permit sufficient disclosure of information that witnesses may be properly protected in the rights which the [74] Constitution gives them. This appears to be another attempt on the part of the United States Attorney to save the Constitution by destroying it, and these objections are designed deliberately to destroy the constitutional privilege because they foreclose to these witnesses information which is essential to the preparation of their defense. And the United States Attorney knows that and the Department of Justice knows that, and the Fifth Amendment is simply being made a mockery of by their

(Testimony of Frances L. Duffy.)

position that this information is confidential. It is not confidential, and the government, as the Zwillman case points out, must take its choice, either to disclose the information or to withdraw the question.

The Court: Yes, I am familiar with the Zwillman case and also the Constitution. You cannot save the Constitution by destroying it. Proceed.

By Mr. McTernan:

Q. The same question, Miss Duffy, as to Elizabeth Glenn.

Since there has been so much colloquy I will reframe it and ask this question:

Did Mr. Carter or any other representative of the United States Attorney's office, on January 12, 1949, before the grand jury or at any other time when you were an official reporter before the grand jury, make a statement or ask a question in which Elizabeth Glenn was described as an officer [75] or representative of the Los Angeles County Communist Party?

Mr. Carter: Same objection as heretofore made.

The Court: Same ruling. Objection sustained.

By Mr. McTernan:

Q. Same question as to Julia Spector Christensen Houdek.

Mr. Carter: Same objection as heretofore made.

The Court: Same ruling. Objection sustained.

By Mr. McTernan:

Q. Same question as to Merle Brodsky.

Mr. Carter: Same objection.

The Court: Same ruling. Objection sustained.

(Testimony of Frances L. Duffy.)

By Mr. McTernan:

Q. Same question as to Frank Spector.

Mr. Carter: Same objection as heretofore made.

The Court: Objection sustained.

By Mr. McTernan:

Q. The same question as to Robert Blair.

Mr. Carter: Same objection.

The Court: Objection sustained.

By Mr. McTernan:

Q. Same question as to Irving Caress.

Mr. Carter: Same objection.

The Court: Objection sustained.

Mr. McTernan: Now, if your Honor please, we are not in [76] a position to make an offer of proof respecting these matters because we obviously don't know what went on in the grand jury room.

The Court: You do know right here.

Mr. McTernan: We know what went on on January 12th. This investigation, as your Honor knows, has been going on since at least October 25, 1948. We have reason to believe that it has been explained to the grand jury that the various persons whose names I have mentioned in the last series of questions have been identified to the grand jury by representatives of the government, to wit, Mr. Carter or Mr. Goldschein, or some other attorney connected with the Department of Justice, and that these people have been identified in approximately the capacities I have indicated in my questions.

We ask that the court either permit this witness to answer the questions or that the court itself examine the transcript of the grand jury proceedings beginning with October 25, so far as this investigation

(Testimony of Frances L. Duffy.)

is concerned, and determine for itself whether or not the persons whom I have mentioned in these questions, beginning with Dorothy Healy down through Irving Caress, have been so described in questions put by a representative of the Department of Justice or statement by one of them.

Mr. Carter: I very humbly suggest, if counsel is interested in having the record show the capacity of these people, [77] that he no doubt has available very competent proof and very direct proof on those very issues. I don't think he should have any difficulty in being able to identify them.

Mr. McTernan: If Mr. Carter has any information he is required under the Constitution to make it known to this court so that the court may make a proper determination of these questions and so that the witnesses' constitutional privilege will not be sacrificed to official whim.

The Court: No, Mr. Carter is not required to prove on this hearing that they are members of the Communist Party. You are the one who is raising that question.

Mr. McTernan: We submit he is.

The Court: The inquiry before the grand jury was stated by Mr. Carter—it has been stated publicly and I think it was stated in the briefs on appeal, and as stated to these witnesses as they came into this grand jury room—that it concerns the investigation of people who are presently employees of the Federal government. And in one of the transcripts, I believe, it states the loyalty of employees. I think there is no doubt that this investigation was com-

(Testimony of Frances L. Duffy.)

menced and it is being continued by the grand jury and the United States Attorney to ascertain whether or not there has been violation by an employee of the United States government in making an oath, and it is so entitled in one of these proceedings, a false oath or violation of Section— [78] what is it, Mr. Carter?

Mr. Carter: Title 18, 1001.

Mr. McTernan: Your Honor, may I interrupt a moment to point out on page 34 of the transcript where he specifically points out—

The Court: Which transcript?

Mr. McTernan: The court transcript of February 11—in which he further points out that one of the issues that the grand jury is concerned with is whether or not these government employees were members of the Communist Party.

The Court: That is correct. Yes. Let us assume that. How, then, would be the best way to find out if they are members of the Communist Party?

Suppose you wanted to find out whether or not somebody was an officer of a corporation, would it be logical to subpoena the corporation officials in and ask them whether or not they are an officer of that corporation?

Mr. McTernan: It certainly would.

The Court: The same thing would be true of the Communist Party.

Mr. McTernan: That is not what Mr. Carter has done. Mr. Carter is trying to tie people who are not those officers in with the Communist Party in order to tie them in in such a way that they can bring

(Testimony of Frances L. Duffy.)

indictments against them, or at least subject them to risk that such indictments will be brought. [79]

Mr. Carter knows who has custody of the membership rolls of the Communist Party. He won't admit it on this witness stand but he will admit it outside the courtroom. But he won't subpoena that person.

Mr. Carter: Mr. Ternan, those are pretty broad statements. I have sat back and listened to your statements. I have certain subpoenas out and if you have that information I would be glad to have you supply it.

Mr. McTernan: Will you stipulate—

The Court: You mean supply the information as to where the person is?

Mr. Carter: Yes.

The Court: As to who has the records of the Communist Party?

Mr. Carter: Yes.

Mr. McTernan: Will you stipulate that you have issued a subpoena for Dorothy Healy?

Mr. Carter: That is correct.

Mr. McTernan: You have? Have you caused a bench warrant to be issued for her?

Mr. Carter: I don't know whether a bench warrant has been issued or not for Dorothy Healy.

The Court: No, there is not. These are the bench warrants here, Mr. Clerk?

The Clerk: Yes. [80]

Mr. Carter: I have several subpoenas issued for Dorothy Healy.

And, by the way, while we are having a little colloquy, I would like to have the record show this,

(Testimony of Frances L. Duffy.)

that on the last session before this grand jury, which occurred on Friday, February 18, 1949, I subpoenaed in four of the subjects who were the subjects of this inquiry and the subjects were offered an opportunity to testify before the grand jury if they desired to sign a waiver. They were told very frankly they would not be forced to testify against themselves. And two of those subjects retained you as attorney, Mr. McTernan.

The Court: What is that?

Mr. Carter: Two retained Mr. McTernan as attorney and appeared through Mr. McTernan.

I mean Mr. McTernan knows, in fact, who are the subjects of the inquiry because he represented two of them up before the grand jury.

Mr. McTernan: That is all very interesting, but I thought we were on a motion to compel certain witnesses to answer questions.

The Court: That is what I thought until you started talking about having all the proceedings before the grand jury here, and the like. What is your present motion as to what you request?

Mr. McTernan: I am trying to cross-examine the witness. [81]

The Court: What question is pending?

Mr. McTernan: I have been trying to explain it to you.

The Court: Ask her a question.

Mr. McTernan: Certain questions have been raised by my line of inquiry, that we are entitled to know from the grand jury record what the setting was in which these questions were asked, and specifically

(Testimony of Frances L. Duffy.)

that the persons about whom these witnesses have been interrogated have been identified to the grand jury as having some official connection with the Los Angeles County Communist Party. Your Honor is apparently ruling that we are not entitled to this.

The Court: I have ruled that you are entitled to no other testimony before the grand jury in connection with these questions except the complete transcript of the testimony of these witnesses at the time the questions were asked.

Mr. McTernan: In view of your Honor's ruling I have no further questions of this witness.

The Court: Step down.

(Witness excused.)

Mr. McTernan: Call Mr. Carter.

Mr. Carter: May Miss Duffy be excused?

Mr. McTernan: Yes.

The Court: You are excused. [82]

JAMES M. CARTER

called as a witness by and in behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: James M. Carter.

Direct Examination

By Mr. McTernan:

Q. You are the United States Attorney for this district, Mr. Carter? A. That is right.

Q. And you have been presenting to the grand jury since October 25, 1948, have you not, certain

(Testimony of James M. Carter.)

matters connected with a purported investigation of the loyalty of certain government employees?

A. Strike out the word "purported" and I will agree with your statement.

Mr. McTernan: I think I have covered this matter in connection with another record, your Honor. I think we can get it in when we get to the motion which I will make incorporate that record.

Mr. Carter, either you or some representative of your office or the Department of Justice, has described Dorothy Healy to the grand jury as the organizing secretary of the Los Angeles County Communist Party in connection with [83] that investigation, have you not?

Mr. Carter: Objected to on the ground that it calls for proceedings before the grand jury which are confidential proceedings except in so far as they are revealed in court; and I object upon the further ground that it indirectly inquires into information that might be in the information of the prosecutor for this district; and on the further ground it is incompetent, irrelevant and immaterial.

The Court: Objection sustained on all grounds.
By Mr. McTernan:

Q. You or some representative of your office or the Department of Justice has, in connection with this investigation, identified Ben Dobbs as labor secretary of the Los Angeles County Communist Party, is that not so?

Mr. Carter: Objected to on the same grounds as heretofore stated, and on the ground it is ambiguous, uncertain and indefinite.

(Testimony of James M. Carter.)

The Court: Objection sustained.

Mr. McTernan: On the last ground also, your Honor? If it is I want to reframe it.

Mr. Carter: Your question was, "some person of the Department of Justice," Mr. McTernan. There are thousands of people in the Department of Justice. I couldn't speak for them.

The Court: Objection sustained. [84]

By Mr. McTernan:

Q. You, Mr. Carter, or one of your deputies or a representative of the Department of Justice in your presence, has identified to the grand jury in the course of this inquiry Ben Dobbs as labor secretary of the Los Angeles County Communist Party, is that not so?

A. I think there is something in the transcript that has been filed which is in evidence, but I object upon the same grounds heretofore stated as to these questions as far as I am concerned.

The Court: Except for the transcripts that are in evidence and the testimony that is disclosed by them, the objection is sustained.

Mr. McTernan: So that my question will be clear, I am directing it to the period before January 12, 1949.

Mr. Carter: Objected to upon all the grounds heretofore stated.

The Court: Sustained.

By Mr. McTernan:

Q. You or one of your deputies, or a representative of the Department of Justice in your presence, has identified to the grand jury in connection with

(Testimony of James M. Carter.)

this inquiry Phil Bock as youth director of the Los Angeles County Communist Party, is that not so?

A. Except as revealed in the transcripts offered as [85] Exhibits A to D, objected to upon all the grounds heretofore stated to this line of questions.

The Court: Objection sustained.

Mr. McTernan: May it be understood that my question goes to the period prior to January 12, 1949?

Mr. Carter: On all the grounds heretofore stated as objections to this line of questions.

The Court: Sustained.

By Mr. McTernan:

Q. And you or one of your deputies, or a representative of the Department of Justice in your presence, has identified to the grand jury in connection with this inquiry Harry Kasinowitz as now or heretofore having been legislative director of the Los Angeles County Communist Party, is that not so?

Mr. Carter: Same objections as heretofore made.

The Court: Same ruling. Objection sustained.

Mr. McTernan, I think that the ruling I have heretofore made is clear on that subject without repeating each one of these questions.

Mr. McTernan: May it be stipulated, your Honor, that I have asked the same questions about the same individuals that I asked Miss Duffy about and that the objections were made and the rulings entered?

The Court: Is that agreeable? [86]

Mr. Carter: That is satisfactory with me.

The Court: The stipulation is approved.

Mr. Carter: Except we might get a little informa-

(Testimony of James M. Carter.)

tion about some of these people from this line of questions.

The Court: Then you do not stipulate?

Mr. Carter: I will so stipulate, your Honor.

The Court: Very well.

Mr. McTernan: The only difference between us is that I am willing to state mine and you are only willing to state yours out of court where it won't do the government any harm.

* * * *

Mr. McTernan: If the court please, in order to save time may the record show that I have asked Mr. Carter whether he has information along the line of the identity of those various people I mentioned in the questions to him, running from Dorothy Healy through Irving Caress, and I take it the same objections will be made and the same rulings will be made?

Mr. Carter: That is satisfactory.

The Court: Very well. So ordered.

Mr. McTernan: Now we ask that there be incorporated into this record, your Honor, the record of the entire proceedings on October 25, 1948.

The Court: In the record of the proceedings on October 25, the first motion there, and which was made repeatedly through the course of the day and evening, was for a continuance on the ground—

Mr. McTernan: We will eliminate the continuance.

The Court: You eliminate that?

Mr. McTernan: Yes.

The Court: Except for all of the motions made and for a continuance on that date?

Mr. McTernan: Yes.

The Court: Is there any objection?

Mr. Carter: No objection.

The Court: So ordered.

Mr. McTernan: And we ask that the entire record of the proceedings involving the criminal contempt prosecution against Dobbs, Kasinowitz and Steinberg on December 14 and 15, 1948, but for the motions for a continuance, be incorporated into the record here.

Mr. Carter: There is only one objection to that. Mr. McTernan, as a part of that record, stated that he had evidence that the Attorney General or somebody in the Department of Justice had made a statement that they had contrived a new method to trap Communists, and subsequently when he filed the document, which he did after the hearing was over by letter to the Clerk, I believe, and a copy to me, it is apparent that the statement was by some other person other than the Attorney General or some official of the Department of Justice.

The Court: It was a statement by a columnist.

Mr. Carter: It was a statement by a columnist. I checked the record in that case and I find that his representations as to that article tying in with somebody in the Department of Justice—

Mr. McTernan: That is not—

Mr. Carter: Let me finish.

Mr. McTernan: Excuse me.

Mr. Carter: So with that modification, that that statement was made by a columnist and not somebody in the Department, I have no objection.

Mr. McTernan: If the court please, I thought I had identified that article as a newspaper article, quoting or purporting to quote certain officials of the Department of Justice. That was the only purpose for which I offered it.

The Court: Let me see the exhibits, Mr. Clerk.

(The exhibits referred to were passed to the court.)

Mr. Carter: I don't have it.

The Court: It is Exhibit K in No. 20403, 20404 and 20405, Kasinowitz, Steinberg and Dobbs, and was filed under cover of a letter dated January 6, 1949.

It purports to be a clipping from the Rocky Mountain News, Friday, October 22, 1948: "Nationwide Drive on Reds is Given Pre-Election Tinge, by Tony Smith, Scripps-Howard Staff Writer," reading:

"Washington, October 21. A nationwide crack-down on the 'open' Communist Party leadership began gathering steam today."

Then it purports to quote somebody:

"The department cannot pin-point the places where grand juries are convened to hear charges involving Communists. It can say only that there are a number."

That is the only quotation in the article. The rest of it says:

"House spy hunters believe Attorney General Tom Clark is sending many cases contained in the FBI files to grand juries all over the country. They say the drive is a pre-election gesture to counter Republican charges that the Truman Administration has failed to meet the threat of Communism with sufficient legal action.

“One expert for the House Un-American Activities Committee concedes * * *”

Mr. Carter: I think right in there, your Honor, is the statement that Mr. McTernan is referring to.

The Court: “He explained the trick is to subpoena the Communist, ask him questions he can’t answer and then cite him for contempt when he refuses.” That is not attributed to anybody. It certainly is not attributed to the Attorney General. And there has been ample time from December, whatever date it was, the middle of December, until now, February 23rd, to have taken a subpoena or secured an affidavit or taken the testimony of Mr. Smith by deposition.

It also states: “Gus Hall, Ohio Communist chairman, says the five Red officials subpoenaed for appearance before the Cleveland grand jury today will go to jail before they turn over the party membership lists. Hall was the only Ohio Communist leader who didn’t receive a summons.”

I want the record to show that if he is related to me I am unaware of it.

Mr. McTernan: Your Honor, the first five paragraphs are obviously information attributed to representatives of the Department of Justice.

The Court: But that is not evidence. That is the rankest kind of hearsay.

Mr. McTernan: Your Honor has already rejected this exhibit.

The Court: No, I have admitted it in evidence.

Mr. McTernan: The matter was rejected along with everything else I offered on December 15th on a number of grounds, the main ground of which was immateriality.

The Court: It is marked here in evidence.

Mr. McTernan: If it was, it was an error of the Clerk.

Mr. Carter: Provision was made that it might be filed.

The Court: Yes, I think that is right.

Mr. McTernan: In the rejected file.

Mr. Carter: What I am objecting to in the record involving Kasinowitz, Steinberg and Dobbs was Mr. McTernan's statement that the Department of Justice made that comment.

The Court: He said that he had proof.

Mr. Carter: That is right.

The Court: Now as far as that is concerned, it is only an offer of proof.

I will ask Mr. McTernan now if the proof that you refer to, and as I recall your statement you have it from a Denver newspaper, if the so-called proof you referred to is this Exhibit K for identification.

Mr. McTernan: Since so many statements have been attributed to me here this morning, may I have a chance to read the transcript and see what it was I said?

The Court: Surely.

Mr. McTernan: I said at page 191 of the transcript that I had only one other item of evidence to offer and I hadn't brought it with me through oversight and I would file it as a clipping from a newspaper and I wanted an opportunity to—

Mr. Carter: Wait a minute. A "clipping concerning a release put out by the Department of Justice."

Mr. McTernan: Yes.

Mr. Carter: A release put out by the Department of Justice.

Mr. McTernan: "It is a copy of one additional newspaper clipping concerning a release put out by the Department of Justice with reference to grand jury inquiries against Communism, and I would like the opportunity to make an offer of that at whatever time best suits the convenience of the court."

Then on Mr. Carter's suggestion I described it from memory. He offered an objection at page 193 and the objection was sustained.

I was then given permission to supply a copy of the clipping, to go into the rejected exhibit file.

The Court: It will be marked for identification. The Clerk will correct that now. It is not in evidence. It was only marked for identification.

* * * *

Mr. McTernan: I offer, your Honor, the record of the— [93]

The Court: I think the whole record can go in. If Mr. McTernan made that statement and he wants it in the record, and this is all he has to back it up with, that is that.

Mr. Carter: I am satisfied. I raised that point and I am satisfied. No objection to the record going in.

The Court: So that all of the record in the proceedings in the criminal contempt matter, *United States v. Kasinowitz, Steinberg and Dobbs*, 20403, 20404 and 20405, will be deemed as part of the record in defense offered in connection with the objections to the witnesses to answer these questions.

Mr. McTernan: Thank you.

Now, your Honor, in connection with our claim of privilege against self-incrimination—

The Court: Do you have any other evidence to offer?

Mr. McTernan: I have certain matters which I want to call to your Honor's attention. I think they are all official records but I want to list them here.

The Court: Very well.

Mr. McTernan: In connection with our claim of the privilege against self-incrimination to questions the effect of which would tie these witnesses in with the Communist Part or with officers of the Communist Party, and on this we make the claim of course with reference to the questions, "Do you know," or "Can you tell us the table of organiaztion [94] of the Los Angeles County Communist Party," "Do you know who in the Los Angeles County Communist Party setup has knowledge of or had charge of membership rolls"—all the questions relating to Dorothy Healy and the questions relating—

The Court: You have the table there that Mr. Carter prepared, have you?

Mr. McTernan: I have the table, your Honor. I cannot accept the table as the correct reflection of the questions put in all instances because they are not.

The Court: Let us take question No. 1, "Do you know the official organization (I think the question was asked occasionally the table of organization or the organizational setup) of the Communist Party in Los Angeles County?" I have already ruled in connection with all of the other witnesses in connection with that question, as well as question No. 3, question No. 4, question No. 5, question No. 6, question No. 7, question No. 8, question No. 13, question No.

14—those questions have been asked heretofore of other witnesses, and unless there is some different defense offered by these witnesses than that which was heretofore offered by the previous witnesses, it would seem to me that my ruling would have to stand.

Mr. McTernan: I have been trying to state some additional material for your Honor to consider in connection with that claim, and I was trying to tie it in to those questions, [95] as well as the question on Mr. Carter's chart numbered 12, "You have publicly stated, on innumerable occasions in this county, have you not, that you were a member of the Communist Party?"

I wanted to call the court's attention to the statements by Mr. Carter which appear at pages 10, 32 and 34 of the court transcript of February 11, 1949, in this proceeding in which his purpose before the grand jury is stated, and particularly at page 34 where he, for the first time in these proceedings, so far as I recall at this time, admits that what he is trying to get before the grand jury is this proof of membership of certain people in the Communist Party and he wants the Communist membership records for that purpose.

So that it is manifest, we submit, in view of Mr. Carter's statements, that his purpose is to tie these witnesses in with the Communist Party in order to find out who the officers are and who the members are and that such a tie-in subjects these witnesses to a reasonable risk of prosecution under the Smith Act in a manner similar to that prosecution now going on in New York City, in which people are being prosecuted because they formed the Communist

Party and because they belong to it, and for no other reason.

We ask the court—perhaps Mr. Carter will stipulate to this—that there is now on trial in New York—I will [96] reframe it this way—that eleven of the twelve defendants in the indictments which are already in this record now by virtue of the court's ruling this morning are now on trial in New York on those indictments.

Mr. Carter: I don't understand that the trial has started. I understand there are still preliminary skirmishes after five weeks.

Mr. McTernan: I understand that that is part of the trial.

The Court: Eleven what?

Mr. McTernan: Eleven of the defendants. There was a severance as to the defendant Foster, your Honor, because of his health. The remaining eleven defendants are now standing trial in New York on the indictments which are in evidence here.

Do you stipulate to that, Mr. Carter?

Mr. Carter: I will stipulate that the case was called as against eleven of them and they haven't yet started to pick the jury. The case is pending back there on preliminary delaying tactics.

The Court: How could that be material unless the Communist Party of Los Angeles County were connected with the Communist Party which these men in New York are charged with organizing and advocating the overthrow of the United States government by force and violence? Is that conceded?

Mr. McTernan: I cannot believe that either Mr. Carter or the court is serious in questioning the lack

of connection between the Communist Party in Los Angeles County and the Communist Party of the United States. In any event there are some legislative findings in the record here to the effect that the Communist Party in Los Angeles is a subdivision of the Communist Party of the United States. Mr. Carter knows that to be the fact, and I don't think this is any serious problem.

The Court: Would you say it was a fact of which the court could take judicial notice?

Mr. McTernan: I don't think it is a fact of which the court may take judicial notice, no. I don't think the court can take judicial notice of the subdivisions of the Democratic or Republican parties either. If the court could I think it could take judicial notice of this.

The Court: Do you concede then, for the purposes of objection to these questions, that the Communist Party of Los Angeles County is part of the Communist Party which is referred to in the indictments now pending in New York?

Mr. McTernan: Yes.

The Court: You concede that?

Mr. McTernan: I certainly do.

The Court: Very well.

Mr. McTernan: Now with reference to the questions [98] dealing with Dorothy Healy and Julia Spector Christensen Houdek, we wish to call the following matters to your Honor's attention in support of an additional ground of the claim of the privilege against self-incrimination.

Mr. Carter has stated in open court this morning that several subpoenas have been issued to Dorothy

Healy. The court records in Case No. 8838-PH disclose that a bench warrant has been issued for the arrest of Julia Spector Christensen Houdek, and the court records in a number of cases, including three of those here today involving Caress and Blair and Brodsky, in which bench warrants were also issued, reveal that the United States Attorney charges the existence of a conspiracy to obstruct justice on the part of persons for whom subpoenæes have been issued for this inquiry. And the language in which this charge is made, your Honor, is as follows—and I am reading now from the application for a bench warrant signed by Mr. Carter and Mr. Goldscheine on November 8, 1948, in connection with Julia Spector Christensen Houdek, and my information is, your Honor, that similar representations, in fact, identical representations, were made in connection with all cases, in that application for bench warrants in connection with this grand jury inquiry contained the identical language (it is a mimeographed document that is used in all of them):

“Said motion is based upon the further ground [99] that said witness is deliberately avoiding service of subpoena, and is deliberately impeding the administration of justice and the functioning of the grand jury of this district; on the further ground that various witnesses for whom subpoenæes have been issued for appearance before said grand jury have been following a common course of conduct in avoiding service and impeding the functioning of said grand jury.”

We call your Honor's attention to Mr. Carter's statement at page 35, in connection with one of the

questions concerning Dorothy Healy, beginning with the words:

“ ‘Q. We have had a subpoena out for Dorothy Healy. Do you know where she can be located or can be found?’ ”

This is a question which is put to the witness Blair.

Now it is our understanding that under old 18 USCA Sections 241 and 242 and new 18 USC Section 1501 and 1503, the deliberate evasion of the court process is a crime, that joint or common knowledge undertaken pursuant to a common plan would constitute a conspiracy to that end, and that would be a crime. We therefore point out to your Honor that any questions in connection with these witnesses that they are called upon to answer which tie them in to Dorothy Healy or this Mrs. Houdek are questions, answers to which might [100] incriminate the witnesses under those sections, and that the United States Attorney has reached this conclusion on the basis of whatever information he may have. Certainly there is a very reasonably warm pursuit and fresh scent with reference to anybody who can be identified or tied in with those two people.

In this connection we call the court's attention particularly to the case of *United States v. Cusson*, reported in 132 F. (2d) 413.

The Court: That is the one you have heretofore cited?

Mr. McTernan: Which I have called to your Honor's attention a number of times before, but it is specifically relevant and material on this particular point because it involved a similar situation, and

there the showing was even much weaker than it is here because there was no showing that this Cusson woman, who was afraid she might be incriminated under this same provision of the law, there was no showing that she had actually been subpoenaed. But still there was a possibility of a conspiracy to obstruct justice by evading process.

There are also questions, if your Honor please, with reference to Elizabeth Glenn in the government's motion. With reference to Elizabeth Glenn, I take it that you will stipulate, as you did before, Mr. Carter, that you will not object to the lack of foundation and the failure to call the [101] Honorable Jack B. Tenney, Senator of the State Legislature, to identify the Third Report of the Un-American Activities in California, dated 1947?

Mr. Carter: Third or fourth?

Mr. McTernan: Third.

(Exhibiting document to counsel.)

Mr. Carter: I will stipulate that the document you have handed me is a report made by Mr. Tenney, reserving my rights to object to the materiality of this material.

Mr. McTernan: Yes.

We offer the following excerpt from the report to which I have just referred, concerning which counsel has stipulated, appearing at pages 34 and 35.

The subheading is: "The Communist Party in Los Angeles County."

"The committee had endeavored for several years to subpoena Elizabeth Leech Glenn, an allegedly important Communist Party functionary in Los An-

geles County. The committee had known for some time that Mrs. Glenn was entrusted with the financial affairs of the party in Los Angeles County. After considerable difficulty a process server for the committee was successful in serving Mrs. Glenn while she was engaged in conversation with the operator of the Lincoln Book Store in Hollywood. [102] The Lincoln Book Store, incidentally, is the Hollywood center for the dissemination of Communist Party literature.

“Mrs. Glenn duly appeared before the committee at its Los Angeles public hearing in October, 1946. She testified that she was in full charge of the financial affairs of the Communist Party of Los Angeles County. She stated that she had been affiliated with the Northwest Section of the Communist Party for several years and that, in addition, she was a member of the Elizabeth Gurley Flynn Club, the Hollywood section of the Communist Party. The Northwest Section was described as comprising the area including and surrounding Hollywood.

“She testified that she received monthly dues from all of the Communists in her jurisdiction and that these dues constituted a considerable portion of the party’s revenue. She stated that the party was largely financed through collections and donations made at forums, lectures, social affairs, etc. It was her duty to forward 50 per cent of the membership dues to the national office of the Communist Party in New York. The state office of the party in San Francisco received 15 per cent and the county organization retained 15 per cent while the [103] sections of the

party within her jurisdiction retained 10 per cent, and 10 per cent went to the clubs.”

The Court: You are offering—

Mr. McTernan: That excerpt, your Honor.

Mr. Carter: I assume, and if I may inquire, that counsel vouches for the evidence he offers before this court. In offering this before the court I assume he vouches for the facts as contained in that report.

Mr. McTernan: I have repeatedly stated to the court that I do not vouch for the report from which I have read, nor for the methods which were used in compiling the information. I think that the fact that such a report can be made in the United States is a sad reflection upon the state of our constitutional guarantees, and it shows that this kind of a thing conducted before committees of this kind, as well as grand juries, it shows the peril in which people are when they espouse an unpopular political belief or can be tied in with people who espouse unpopular political beliefs.

Furthermore, I am confident, if the court please, that Mr. Carter and his FBI agents and the grand jury, which he is manipulating to this unconstitutional end, is in a far better position to vouch for the accuracy of such information than I am.

Mr. Carter: May the court strike the words from Mr. [104] McTernan's statement, "the grand jury which Mr. Carter is manipulating to the unconstitutional ends."

The Court: I cannot strike it. He has made it.

Mr. Carter: Let's get down to a realm of advocacy and not make statements like that.

The Court: Yes, it is going a little beyond it. It

is using it as a sounding board for making conversation which is being reported and repeated. I am conscious of that.

Mr. McTernan: That is what is being done by the grand jury and by Mr. Carter, as I have repeatedly stated to the court.

Mr. Carter: Since Mr. McTernan can't vouch for this statement I of course can't stipulate, and I object to its admissibility on the ground that it is hearsay. It is an *ex parte* report. Mr. McTernan has no doubt better evidence available than what he has offered. I object on the ground it is incompetent, irrelevant and immaterial.

The Court: I do not quite get the basis of your offer, Mr. McTernan. What are you offering it for? As a matter of common knowledge or as a matter of which the court can take judicial notice, it being a public document, or the fact that the report was made by Mr. Tenney or the fact that it was made on that date or what? What is the basis of your offer?

Mr. McTernan: I am offering this, your Honor, to show that there is at least sufficient factual information available [105] to an official body, namely, the California Legislative Committee on Un-American Activities, to justify it in reaching the conclusions which have been stated, and thereby to indicate the peril to which people who could be tied in to Elizabeth Glenn would run by way of possible indictment by the Department of Justice and grand juries to whom the Department of Justice presents such matters under the Smith Act.

The Court: If I understand you correctly, your statement concerning this report is that you vouch

for nothing in it, nor the means by which the information therein secured was obtained? You not only do not vouch for it but you condemn it, is that right, as useless, as worthless, and as unconstitutional? Is that correct?

Mr. McTernan: I condemn the report, your Honor, as the exercise of illegal and unconstitutional powers by a governmental authority.

The Court: Then do you vouch for the accuracy of this statement?

Mr. McTernan: I do not vouch for the factual statements because I don't know of my own knowledge.

The Court: Do you vouch for them?

Mr. McTernan: I cannot vouch for them.

The Court: You cannot vouch for them?

Mr. McTernan: For the reasons I have already stated. [106]

The Court: Then you are offering as evidence here something which you condemn?

Mr. McTernan: I would not vouch for this any more than I might vouch for a jury's verdict in a case in which I lost. I could agree with the jury and not agree with their conclusions to be reached from the facts, but the fact that they did reach a certain judgment—

The Court: Then it amounts to nothing more nor less than that somebody said someplace—the fact that it happened to be Mr. Tenney, the fact that it happened to be put in a publication is immaterial—but that somebody said someplace that Mrs. Glenn was the treasurer of the Northwest Section of the Los Angeles County Communist Party, and that she

forwarded 50 per cent to New York and kept so-and-so?

Mr. McTernan: I think it shows that not only this official committee took evidence from which it reached these conclusions, but it also shows part of this picture of official interference and intimidation.

The Court: You mean there is some connection?

Mr. McTernan: Between the Communist Party and the attempt to build up this illusion of illegality about the Communist Party, which lays the basis for this claim of privilege; that people now run a substantial risk of being declared criminals who have been identified with the Communist Party.

The Court: In other words, if they disclose to the Federal grand jury they run the risk of being claimed to be a criminal by Mr. Tenney?

Mr. McTernan: No, your Honor.

The Court: Let us stick to the proposition.

Mr. McTernan: I think your Honor has misstated what I am trying to say.

The Court: I am trying to understand the basis of your offer. This is the way it looks to me now—I may have misunderstood you—it looks to me like you are offering something which you condemn, which you think is worthless, which you probably think is untrue, and are offering it here as evidence in court, but nevertheless the grand jury and the United States Attorney and I must take it as true. That is the way it looks.

Mr. McTernan: Well, your Honor, I simply submit to you, with all due respect, that you have completely misstated what I have said to the court and

that this is somehow twisting me into some kind of a corner.

The Court: I am merely trying to state it.

Mr. McTernan: Your Honor is familiar with such cases, for example, as *United States v. Weisman*—

The Court: Yes, and also the *Zwillman* case.

Mr. McTernan: May I be allowed to finish my statement in order to explain to you what I am trying to do here this [108] morning?

The Court: Surely.

Mr. McTernan: There the court permitted a witness to testify as to what was rumored in the community about him in order to show his peril. He was permitted to show what was said in a newspaper in order to show the peril to him.

Now, what I am trying to do is to show to you what the legislative committee of the State of California has done and said about these people who were involved in this thing in order to show you that there is some possibility of peril. I am not required, and these witnesses are not required, to prove to you in the form of normally admissible evidence in a court of law that the facts actually are that they are members of the Communist Party or that they are actually are such kinds of persons that an indictment could be had against them. If they were required to do that the privilege would be meaningless because in order to save themselves they would have to condemn themselves.

What we are trying to show here is the danger, the gravity of the danger. We are showing to you that a legislative committee of the State of California

has taken facts, has made findings and has reported on them. These are simply in order to show the nature of the risk.

Whether these facts are true doesn't make any difference, because if they were forced, as I said before, to [109] prove the truth of these facts they would have to prove the very thing that they are claiming they shouldn't be required to disclose.

So all we are trying to do is to show you that there are apparent facts in existence—

The Court: Or rumors?

Mr. McTernan: —which, if true—

The Court: Or rumors of facts?

Mr. McTernan: I think you would be justified in treating this report as more than a rumor. I think that Mr. Carter and his FBI men treat them as more than rumors. They apparently are willing to use this kind of stuff in order to call grand juries together and have their lives prolonged, and so forth and so on, in order to harass these people.

Now, all we need to show to you is that these facts are talked about and are reported and therefore there may be a reasonable risk, and if there may be a reasonable risk, you have to deny the motion.

The Court: That is the sole basis upon which you offer it then?

Mr. McTernan: That is correct.

The Court: Why did you not say so in the first place?

Mr. McTernan: I tried to say it four times and your Honor tried to repeat it four times and said it differently from what I stated because I understood your Honor was [110] saying and therefore

it was necessary to say it over and over again. I hope that now we can reach agreement at least as to what I said.

The Court: The record will show what you said.

Mr. McTernan: I repeat my offer.

The Court: It will be admitted.

Mr. McTernan: For the same purpose, your Honor, we offer an excerpt from page 23 of the same report, under the subheading: "Dorothy Healy on 'Browderism.' "

"The committee subpoenaed Dorothy Healy (formerly Dorothy Ray) at its Los Angeles hearing, January 2, 1946. Since Mrs. Healy was, at the time of the hearing, secretary of the Communist Party of Los Angeles County, and had been a delegate to the National Convention of the Communist Party of the United States in New York at which the Browder changes were adopted, her testimony is most illuminating:"

That is the end of the excerpt.

The Court: Admitted.

Mr. McTernan: For the same purpose, your Honor, we offer an excerpt from page 222 of the 1948 report of the same committee—

The Court: What was the other report?

Mr. McTernan: 1947. The title is "Third Report, Un-American [111] Activities in California, 1947." It was from that report that I read the two excerpts which are now in the record.

The next report is entitled, "Fourth Report, Un-American Activities in California, 1948," with a subheading, "Communist Front Organizations."

Mr. Carter: I have not objected to the admis-

sion of the first extract and I didn't get my objection in to the admission of the extract on Dorothy Healy. I would like the record to show that we have the same objection to the admissibility of the extract just read concerning Dorothy Healy that we had to the first extract.

The Court: The objection is overruled. It is offered in evidence as a rumor or a statement or whatever it is.

Mr. McTernan: As your Honor has already pointed out, the record will show what I claim it to be so I don't feel it is necessary to comment on your Honor's use of the word "rumor," by way of disengaging myself from the agreement with your Honor's description.

We offer now, your Honor, as I said from the 1948 report, an excerpt beginning at page 222 and extending over to page 223 as follows:

"Frank Spector was subpoenaed and appeared before the committee in Los Angeles on Wednesday, February 18, 1948. He stated that he was born in [112] Russia and that he is an alien. He has lived in California since 1920, off and on. He was in the East for some time and returned to Southern California in 1942. Spector would not admit acquaintance with V. A. K. Tashjian, alias Parker, former control commissioner of the Communist Party for Southern California. Likewise he refused to answer questions concerning his official position in the Communist Party. (It is known that he is the present control commissioner for the party. This position is a most powerful one

within the Communist Party organizational structure as it deals with disciplinary measures——”

The Court: Who is “he,” Tashjian or Spector?

Mr. McTernan: That is Spector. I gather from the context that the “he” refers to Spector.

The sentence says: “Spector would not admit acquaintance with V. A. K. Tashjian, alias Parker, former control commissioner of the Communist Party for Southern California. Likewise he refused to answer questions concerning his official position in the Communist Party.” And then it goes on with “he,” so I think it refers to Spector.

Beginning with the parentheses:

“(It is known that he is the present control commissioner for the party. This position is a [113] most powerful one within the Communist Party organizational structure as it deals with disciplinary measures for recalcitrant party members.) Spector, however, defiantly admitted that he was a member of the Communist Party.”

Mr. Carter: I take it that the same record as to your vouching for this statement will be the same as to the previous excerpt that you read?

Mr. McTernan: I make the same statement with reference to vouching for this report and for Mr. Tenney’s works as I have made with reference to the 1947 report. And I offer this excerpt for the same purpose that I stated to the court I offered the excerpt from the 1947 report.

Mr. Carter: Objected to on the ground it is

hearsay, no bearing upon the issues of the case, incompetent, irrelevant and immaterial.

The Court: It is hearsay but it is admitted. [114]

* * * *

Mr. McTernan: I submit to the court that the questions, "Do you know any person in Los Angeles County who advocates the overthrow of the government of the United States by force and violence," and the question, "Do you know any organization whose purpose it is to advocate the overthrow of the government of the United States by force and violence," raise substantially the same problems in so far as the privilege against self-incrimination is concerned, and the other constitutional objections which we have heretofore urged with reference to questions which tie the witnesses in with the Communist Party, and we submit nothing new or different in that connection but simply advise the court that we urge the same grounds, simply pointing out, as we see it, the legal question is much simpler since now the government is using the language of the criminal statute and an answer to these questions might very well tie these witnesses in with an organization or a person who is engaged in an unlawful activity in the language used by the statute itself.

The Court: If these persons have a right to refuse to answer those questions, every person has a right then to refuse to answer the question whether or not they know any person who advocates the overthrow of the government by force and violence.

Mr. McTernan: Well, I am not prepared to take so broad a position at this point. Any witness whose answer might tend to tie him in with such a group

would have the same right to refuse to answer that question as a witness before the New York grand jury had the right to refuse to answer a question as to his business associates, or that this witness Cusson had to refuse to answer questions concerning a meeting.

The Court: Then the basis of this is possibly these people do know somebody who might advocate the overthrow of the government by force and violence, so in that case the statute would be meaningless and the government of the United States, which is created by a Constitution, sowed its own seeds for its complete destruction by tying the hands of anybody who inquired into whether or not anybody wanted to overthrow it.

Mr. McTernan: The hands of the government are tied under the Fifth Amendment as to any witness regardless of his political beliefs where the government desires to get an answer on which a prosecution may be based.

The Court: Is that a political belief?

Mr. McTernan: Sir?

The Court: Is that a political belief, to overthrow the government by force and violence?

Mr. McTernan: I am not here to argue that question, your Honor, because that is not what is involved.

The Court: You just stated it was a political belief and my question is—

Mr. McTernan: I did not so state it was a political belief, and I don't think that that question is involved here, and I don't think that the argument of it is necessary for the determination of this case.

The Court: I see.

* * * *

Mr. McTernan: Now we have never stated in this courtroom that the Communist Party advocates the overthrow of the government by force and violence, but we have stated, that we have tried to prove and we have been prevented from proving by the rulings of this court, that it is the official position of the United States government that the Communist Party so advocates and therefore that a witness is privileged—

The Court: Just a moment, counsel. You say you have tried to prove and you have been prevented from proving. You have made certain offers of proof which I held were immaterial. You have made certain other offers of proof which I held were hearsay. You have been given an opportunity in these proceedings of going on for some time, and since the beginning of these proceedings you have stated that you were going to prove that the official position of the government of the United States was that as you are trying to say now.

* * * *

Mr. McTernan: The same reasoning applies to the question which was put to the witness Spector, "You have publicly stated," etc., "that you were a member of the Communist Party." This is asking the witness to admit membership in the Communist Party. And there all of the reasoning which has been urged to your Honor, not only this morning but at the other numerous times in the course of these proceedings, also applies.

The Court: I will say right now, as to that question I think it is immaterial to the inquiry,

whether or not Frank Spector stated on innumerable occasions that he was a member of the Communist Party.

Mr. McTernan: May I be excused just a moment?

* * * *

Mr. McTernan: Your Honor, we have now submitted to the court all of the matters which we care to offer by way of opposition to the government's motion. In view of the fact that the law has been argued at length and the contentions which we make are fully familiar to your Honor, I think it unnecessary to offer argument.

You have in addition to everything else which has been offered to you a copy of our brief on appeal to the Court of Appeals of the Ninth Circuit?

The Court: Yes.

Mr. McTernan: Which summarizes our position on all the points about as well as we could do it. Therefore, in the interests of time, unless the court desires clarification on certain of the items of evidence or certain of the legal points which we have urged, we will not offer anything more at this time.

The Court: Do you have anything further or offer, Mr. Carter?

Mr. Carter: Nothing further.

I would suggest, however, that if your Honor makes an order that some of these questions be answered, that probably a written order would be prepared so that we may get the exact wording of each question. If that will be of some assistance, I will be glad to do that.

The Court: In so far as the questions which

were asked of the other witnesses, the additional reasons this morning, if any additional reasons were offered, I do not think changes the complexion of the situation or indicates that [124] the objection of the witnesses to answer the questions on the ground it might incriminate themselves is well taken.

I have already ruled on this question, No. 12, in the table submitted, that it is immaterial. That was asked only of Frank Spector.

I am wondering whether or not, in connection with the inquiry that is made, that is, to wit, an inquiry to determine whether or not certain parties, employees of the United States of America, have made false statements or, as Mr. Carter has stated on page 34 of the transcript, "one of the issues involved is whether or not they were members of the Communist Party of Los Angeles County," in view of that whether question No. 10 is material. One witness answered it. The witness Spector answered it.

What is your position on that, Mr. Carter, the materiality of question No. 10 to this inquiry? I think No. 11 is material, do you know any organization. I think perhaps No. 10 is material.

Go ahead.

Mr. Carter: One thing I have in mind is this, it just poses the question of how far these witnesses will go in refusing to answer questions. As your Honor pointed out, if a witness can refuse to answer that question, based upon his claim of privilege under the Constitution, then you are al-

lowing the Constitution to be the very sword by which it [125] could be struck down.

The Court: If it is immaterial it does not make any difference.

Mr. Carter: Yes, that is true on that, but it was a general question as to any person. It is more than that, it is a preliminary question.

The Court: Of course they are not objecting to that on the ground of its materiality.

Mr. Carter: It is a preliminary question which would thereafter be followed up possibly by reference to some particular name.

The Court: Yes, I think so. I do not see any reason for changing the ruling I have heretofore made. All of these questions, under the *In Re Willis* case, decided by Justice Marshall, are the same nature and type, "do you know," "do you know," "do you know," "do you know any person," "do you know any organization," "do you know Dorothy Healy"—the one question, "Who are you an organizer for" takes it out of the "do you know" category—but I cannot see that that could possibly incriminate anybody.

It is unnecessary for me to say any more than I have heretofore said in connection with the other rulings. The order will be on the witnesses to answer the questions. [126]

* * * *

The Court: Yes.

Mr. Spector, come over to the lectern.

You are now ordered and directed to be and appear before the Federal grand jury of this district

in its office in the Federal Building on the sixth floor on March 3rd at 9:30 o'clock in the morning of that day and make answer to the following questions:

"Q. Do you know the official organization of the Communist Party of Los Angeles County?"

"Q. Do you know Dorothy Healy?"

"Q. Do you know where she can be found or [127] located?"

"Q. Do you know her business or home address?"

"Q. Do you know her husband's name?"

"Q. Do you know her husband's occupation?"

"Q. Do you know Dorothy Healy's occupation?"

"Q. Do you know any organization in this community which has for its purpose the overthrow of the government by force and violence?"

Mr. Carter: Mr. Spector answered that question.

The Court: Yes, he did. He subsequently answered it.

Mr. Carter: Yes.

The Court: "Q. Do you know whether or not Dorothy Healy is married?"

Do you understand the order of the court?

Mr. Spector: Yes, sir.

The Court: Very well. You may stand aside.

Mr. Caress, you are ordered and directed to be and appear before the grand jury of this district in its office in the Federal Building on Thursday, March 3rd, at 9:30 o'clock in the morning of that

day, and at that time and place to answer the following questions:

“Q. Can you tell us the table of organization of the Communist Party of Los Angeles County?”

“Q. Do you know who in the Los Angeles [128] County Communist Party setup has knowledge of or is in charge of membership?”

I take it, Mr. McTernan, that you are checking these?

Mr. McTernan: Yes, I am.

The Court: As against the transcript?

Mr. McTernan: Yes, I am.

The Court: “Q. Do you know Dorothy Healy?”

“Q. Do you know where she lives?”

“Q. Do you know where she can be found or located?”

“Q. Do you know her husband’s name?”

“Q. Do you know his occupation?”

“Q. Do you know any person in this community who advocates the overthrow of the government of the United States by force and violence?”

Mr. Carter: I think the word was “county,” “anyone in this county.”

The Court: “* * * any person in this county who advocates the overthrow of the government of the United States by force and violence?”

“Q. Do you know any organization in this county which has as its purpose the overthrow of the government by force and violence?”

Do you understand the order?

Mr. Caress: Yes, sir. [129]

The Court: Very well.

Mr. Brodsky: You are now ordered and directed to be and appear before the grand jury of this district at its place of meeting on the sixth floor of this building on Thursday, March 3rd, at 9:30 o'clock in the morning of that day, and then and there make answer to the following questions:

“Q. Do you know and can you tell us the table of organization of the Communist Party of Los Angeles County?”

“Q. Do you know who, in the Communist Party in Los Angeles County, is in charge of membership or membership rolls?”

“Q. Do you know Dorothy Healy?”

“Q. Do you know what her business or residence address is, or where she can be located?”

“Q. Do you know her husband's name?”

Mr. McTernan: Did your Honor skip one, line 7?

The Court: No, that is the same. It is included in the same question.

Mr. Carter: No.

The Court: Questions 4 and 5 are the same.

Mr. McTernan: I don't think so, your Honor.

The Court: Very well. The last one was: “Do you know what her business or residence address is, or where she can be located?” All three of those are in one question. That [130] is No. 4 and No. 5 in the table. The next question is No. 6.

Mr. McTernan: At page 14, line 7, there is a question, “Do you know what her business or occupation is?”

Mr. Carter: The questions on the chart are out of order, Mr. McTernan. That comes later.

Mr. McTernan: I see.

The Court: "Q. Do you know her husband's name?"

"Q. Do you know his (her husband's) business or occupation?"

"Q. Do you know what her business or occupation is?"

"Q. Do you know any person in the County of Los Angeles who advocates the overthrow of the government of the United States by force and violence?"

"Q. Do you know any organization in the County of Los Angeles that has for its purpose the overthrow of the United States government by force and violence?"

"Q. Who are you an organizer for?"

Do you understand the order of the court?

Mr. Brodsky: I do.

The Court: Very well.

Mr. Blair. You are ordered and directed, Mr. Blair, to be and appear before the Federal grand jury of this district [131] in its office on the sixth floor of this building on March 3rd at the hour of 9:30 o'clock in the morning of that day and then and there make answers to the following questions:

"Q. Do you know the table of organization, or who the officials of the Communist Party of Los Angeles County are?"

"Q. Do you know who are what officer of the Communist Party of Los Angeles County is in

charge of membership, or has knowledge of the membership rolls in this county?"

"Q. Do you know Dorothy Healy?"

"Q. Do you know where she can be located or can be found?"

"Q. Do you know her business or home address?"

"Q. Do you know her business or occupation?"

"Q. Do you know what her husband's name is?"

"Q. Do you know his occupation, her husband's occupation?"

"Q. Have you seen Dorothy Healy recently?"

"Q. Do you know any person in the County of Los Angeles who advocates the overthrow of the government of the United States by force and violence?"

"Q. Do you know any organization in the County of Los Angeles which has the announced [132] purpose of the overthrow of the government of the United States by force and violence?"

"Q. Do you know Elizabeth Glenn?"

"Q. Do you know Mrs. Houdek?"

Do you understand the order of the court?

* * * *

Mr. McTernan: Your Honor, I have a matter in connection with Irving Caress. It is a request, if your Honor please, for an order permitting Mr. Caress to leave the district on business. The facts are stated in the affidavit of Louis Chatoff.

The Court: He is ordered to be here on March 3rd. How can he be here on March 3rd and in New York on March 7th?

Mr. McTernan: Assuming that he is released to do this, he will fly to New York.

The Court: He is seeking permission of the court to leave the district during the period between February 27 and March 25. I have just ordered him to be before the grand jury on March 3rd.

Mr. McTernan: This was framed this morning before this proceeding took place and we understood then that all witnesses—we had a stipulation from Mr. Carter that all witnesses—would simply be subject to call before the grand jury, and we didn't know the specific date was going to be fixed. I take it that Mr. Caress can appear here on March 3rd and still get to New York on time, assuming that the planes can get through.

Mr. Caress is engaged in a small business, it is not a large enterprise, and their ability to stay in business depends upon their ability to send a representative back to this fair and to engage in a rather complex process of demonstrating and selling their product and obtaining orders so that the company may continue in business.

The Court: I am agreeable to letting him leave the district but I think it ought to be consonant with the time that the grand jury members are coming down here, who are also away from their business.

Is there any objection to this, Mr. Carter?

Mr. Carter: No objection if it doesn't interfere with the business of the grand jury. The matter is set on the 3rd. He is still under bond. I have no objection to him leaving the district.

Of course he is merely reaping some of the fruits of what his own misconduct was in running out on

the subpoena. He is one of the men that we had a bench warrant out for. Had he not been on the run then this situation would not have developed. It just happens now that he had delayed the business of the court until it now interferes with his own business. I can't feel too sorry for him, but if he is around on March 3rd I will have no objection to him leaving the district.

The Court: I will indicate now that I will make an order, but I will wait fixing the time that he may leave until after the proceedings on March 3rd. In other words, you may renew this motion on March 3rd, and I anticipate that he will be permitted to leave. Of course if he testifies he can go anyhow, he is through, he can be released and his bond exonerated. If he does not, I do not know what will eventuate, but at that time I will entertain a motion again, and indicate now that it will be my intention to grant it for a reasonable time.

* * * *

[Endorsed]: Filed April 6, 1949. [133]

Nos. 12217-12221

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for the Ninth Circuit

No. 12217

SAMUEL HARRY KASINOWITZ, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

and Consolidated Cases

No. 12221

LILLIAN ADELE DORAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

and Consolidated Cases

Transcript of Record

In Four Volumes

VOLUME IV.

(Pages 1 to 237, inclusive)

PAUL P. O'BRIEN,

CLERK

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In the District Court of the United States in and for
the Southern District of California,
Central Division

Honorable Peirson M. Hall, Judge Presiding.

Nos. 8786-PH to 8795 Incl.

In Re: BEN DOBBS, PHILIP BOCK, DEL-
PHINE MURPHY SMITH, FRANK ED-
WARD ALEXANDER, MIRIAM BROOKS
SHERMAN, SAMUEL HARRY KASINO-
WITZ, MRS. DOROTHY BASKIN FOREST,
MRS. CHARLES HOLLISTER NOBLE and
WESLEY BISSEY.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California
October 25, 1948

Appearances: For the Government: James M. Carter, United States Attorney, Los Angeles 12, California; and Ray H. Kinnison, Assistant United States Attorney, Los Angeles 12, California; and Max H. Goldscheine, Special Assistant to Attorney General, Washington, D. C.; and Vincent P. Russo, Special Assistant to Attorney General, Washington, D. C. [1 *] For the Respondents: Gallagher, Margolis, McTernan & Tyre, 112 West Ninth Street, Los Angeles 15, California; by Ben Margolis, Esq., and John T. McTernan, Esq. [2]

The Court: I see the United States Attorney, Mr. Carter, here.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

moving parties, who are designated as Ben Dobbs, et al.

Is Ben Dobbs present? (Mr. Dobbs stood.)

Philip Bock? (Mr. Bock stood.)

Delphine Murphy Smith? (Mrs. Smith stood.)

Frank Edward Alexander? (Mr. Alexander stood.)

Is that your name?

Mr. Alexander: That is right.

The Court: Each of you, those names I have called? (Assent.)

Miriam Brooks Sherman?

Mrs. Sherman: Yes, sir.

The Court: Samuel Harry Kasinowitz? [6]

Mr. Kasinowitz: Yes, sir.

The Court: Mrs. Dorothy Baskin Forest?

Mrs. Forest: Present.

The Court: And Mr. Henry Steinberg?

Mr. Steinberg: Yes, sir.

The Court: Very well. The parties are all here.

* * * *

[7]

Now, your Honor, first of all, as the motion indicates, particularly the portion on the last page, as I have stated to your Honor we haven't had time to complete our record on this matter, and our first request of this court is that we be given an opportunity to prepare affidavits and a memorandum of points and authorities in support of the record so that our motion may be complete.

I think that we have exercised all the diligence that could be exercised under the circumstances. My failure to have complete papers is certainly not due to any negligence on our part, any failure to act as

promptly as it was possible [8] to act under the circumstances.

So before considering the merits of this motion, your Honor please, we would like to have your Honor rule on that request and give us a reasonable time to complete our record, in addition to getting out certain subpoenas to produce evidence that we just haven't had time to get out.

That is our first request and suggestion in this matter, your Honor.

The Court: Do you wish to be heard?

Mr. Carter: I take it that the grounds of your motion, Mr. Margolis, are, however, as stated, that you are attacking the composition of the grand jury?

Mr. Margolis: There are three grounds stated. They are as stated—if I had had a little bit more time I would have, I think, phrased them a little more fully—but they are in substance as stated in the motion. That is correct. They are not limited to the challenge of the grand jury.

Mr. Carter: That is a question which was tried before your Honor in the Fishermen's case, now on appeal. I haven't checked recently, but I think the grand jury—if I am wrong the Clerk can correct me—is being impaneled presently in the same manner as it was being impaneled at the time of the trial of the Fishermen's case.

The Court: There appears to be three grounds. One is attacking the composition of the grand jury on the ground that [9] there was discrimination, and so forth.

The second ground, the grand jury is not conducting a bona fide investigation within the scope of its

power in the investigation herein instituted by the office of the Attorney General of the United States solely for political reasons and not for the bona fide purpose of investigating the commission of any crime.

Mr. Carter: I can dispose of that very quickly, by characterizing it as sales talk.

The Court: That can be disposed of by whether or not there is a statute prohibiting something which the grand jury is now investigating. I do not have before me the nature of the inquiry, but I suppose it could be answered by that.

The third ground appears to me to be the same, except the addition that they are denied the due process referred to under the Fifth Amendment because they are conducting an investigation to harass and annoy persons believed to be members of the Communist Party and to discriminatorily apply the law.

Now do you wish to be heard further?

Mr. Goldschein: Yes, may it please your Honor.

On this question, the first proposition here raises a most unusual question, one that I have never heard raised before, and I doubt whether this court has ever heard it, the question of whether or not a witness may challenge the regularity of a grand jury that he is to appear before. That is the [10] question here.

The question is not a defendant who comes in and says that he may be prejudiced by a grand jury that is not properly selected. This is a witness who comes in and says, I want to determine first whether or not this grand jury whom I am summoned to appear before is properly impaneled. The witness doesn't

know what he is being subpoenaed to testify about. All he knows, may it please your Honor, is that he has a subpoena from the Federal Court to appear before the Federal grand jury, and he says that the Attorney General intends to vilify him, in substance. Why the whole motion is scurrilous and should be stricken.

A witness has no right to select his forum before which he will testify. He has no right to come into a court and say, show me whether or not this grand jury is properly selected from the body of the people of this district. He has no right to say, I am subpoenaed in here because the Attorney General doesn't like me.

Why there is nothing in this record here, nothing in this motion other than that the witness says he was subpoenaed at 7:00 o'clock in the morning. I don't know, if a Federal marshal can get up at 7:00 o'clock, can get up in time to serve a subpoena on a witness at 7:00 o'clock in the morning, I don't see what the witness can complain about. Is it the complaint that the marshal did serve him? Is it the complaint [11] that he doesn't want to answer the questions he hasn't been asked to answer as yet?

This motion simply says nothing other than, we want the court to make inquiry about the forum that we are going to testify before. We want the court to make inquiry now on the matter that we may be asked about.

The Court: Mr. Margolis, do you have any authority at all to support your proposition that a witness may challenge the grand jury?

Mr. Margolis: I haven't had time to check the

authorities, but I would like, with perhaps a little less heat and a little bit more consideration of the logic of the situation, to discuss the matter with the court. And I would also like to have an opportunity after such discussion to obtain those authorities.

The Court: That is the point. Before passing to a consideration of your request for preparing affidavits or further memorandum of points and authorities, can you submit some authorities to me on that, on that one point? If so, I will give consideration to them, and as to that one point I will put the matter over until 1:30 o'clock this afternoon.

Mr. Margolis: May we have until 2:00 o'clock.

The Court: I have a lot of other matters at 2:00 o'clock.

I will put it over until 1:30, and each side will have authorities on that one point. [12]

Mr. Margolis: Very well.

The Court: Very well.

Any other matters on the calendar, Mr. Clerk?

Mr. Carter: The witnesses will be ordered to return, your Honor?

The Court: The witnesses are ordered and directed to return to this courtroom at the hour of 1:30 o'clock this afternoon.

Mr. Carter: There may have been other witnesses who were subpoenaed whose names are not on this motion.

The Court: The only persons I am concerned about are the names on the motion. If there are any other witnesses they should be before the grand jury at this time and you may take the appropriate proceedings if they are not there.

Mr. Margolis: It may be, your Honor, that I received some phone calls and was asked to add names to this that I didn't act on solely on the rush of the matter and I will so advise the court this afternoon.

The Court: Very well.

The Clerk: We have some civil matters on the calendar, your Honor. [13]

* * * *

October 25, 1948; 1:30 o'clock p.m.

The Court: The matter of the motion filed by Mr. Margolis on behalf of Ben Dobbs and others is on for hearing. [14]

* * * *

Mr. Margolis: * * * *

I also want to ask leave to amend my motion to include at least one additional name—two names, your Honor—both of whom were subpoenaed for 2:00 o'clock this afternoon, not for 10:00 o'clock this morning, and both of whom are here I understand.

The two names I would ask leave to add to my motion are the names of Mrs. Charles Hollister Noble and Mr. Wesley Bissey. Both of those persons I understand are here. Both were subpoenaed for 2:00 o'clock, so I would ask leave to amend by motion to include those names.

The Court: Is Mrs. Charles Hollister Noble present?

Mrs. Noble: Present.

The Court: Is Mr. Wesley Bissey present?

Mr. Bissey: I am present.

The Court: Very well.

Any objection to amending the motion?

Mr. Carter: No objection.

The Court: You may amend it by interlineation.

Mr. Carter: If you represent Mrs. Davison we have no objection to inserting that name also. We can work out with [15] you some arrangement with reference to the time of her appearance, I am sure.

Mr. Margolis: I would like to add that name at this time, your Honor.

The Court: If there is no objection, you may do so.

Mr. Margolis: I am not sure of the spelling. What was the name, Mrs. Sidney—how do you spell it?

Mr. Carter: D-a-v-i-s-o-n.

Mr. Margolis: It is understood, your Honor, that she is not in court?

The Court: It is understood she is not in court and is about to be confined.

Mr. Margolis: She is confined in the hospital at the present time.

The Court: She is confined?

Mr. Margolis: Yes.

The Court: As a result of a biological sequence, however, not as a result of any criminal procedure?

Mr. Margolis: That is correct.

The Court: Very well.

This should be stamped "filed", Mr. Clerk.

The Clerk: Very well, your Honor.

The Court: And it was handed up for filing at about 11:15 or 11:30 this morning?

The Clerk: Yes, your Honor. [16]

Mr. Margolis: Your Honor please, I attempted to do a rather hurried research job and I am prepared at this time at least to make a preliminary

showing with respect to our right to raise this issue by the motion to quash on behalf of the moving parties.

I need hardly cite to your Honor the basic cases holding that under the power of the Federal Courts—

The Court: Let me see. Before we proceed, let us get the record straight in connection with this matter. Each one of the petitioners herein have appeared in response to a subpoena regularly issued, that is to say, insofar as anything except the jurisdictional grounds which you are challenging here is concerned—

Mr. Margolis: We are not disputing that.

The Court: And served upon them by the United States marshal, ordering and directing each one of them to be and appear at the grand jury room in this building of this district at a certain hour in connection with the grand jury investigation?

Mr. Margolis: That is correct, without conceding, of course, the validity of the summons.

The Court: Does anybody have a subpoena here?

Mr. Margolis: Yes, we have a subpoena. We are not challenging with respect to these persons that they were served, your Honor. [17]

The Court: I understand.

(The document referred to was passed to the court.)

The Court: The subpoena will be received and filed in support of your petition, without conceding your point.

Mr. Margolis: We have no objection to that being introduced as showing the fact of service and the type of subpoena that was served.

I will say that the only differences between that subpoena and the others is the differences in the names of the persons subpoenaed and that in some instances the persons were directed to appear at 2:00 p.m. of today and in other instances at 10:00 a.m. as of today.

The Court: Very well. In other words, they were subpoenaed to appear to testify to the truth and to give evidence before the grand jury.

Mr. Margolis: Those by that document were served. That document was served on Mr. Dobbs and similar documents, as I have indicated, were served on the others.

The Court: Very well. This will likewise be filed.

Very well, Mr. Margolis.

Mr. Margolis: I just want to state briefly, your Honor, that we are relying of course upon the basic cases, the Glasser case, the Theil case and the Smith case, appearing respectively at 86, 90 and 85, Lawyers' Edition, particularly the first two, which hold that under its power of supervision [18] of trial courts the Appellate Courts have laid down the rule that any indictment returned by a grand jury, or any conviction by a trial jury—there being no distinction as far as the subject which we are discussing is concerned—is void if the jury, the grand jury in the one instance and the trial jury in the other, was not selected in a manner calculated to attain a representative cross-section of the community.

It is also the rule, your Honor—and I cite to you the case of *United States v. Gale*, 27 L.Ed. 857—that the exception or the challenge to the trial or grand jury must be taken at the earliest possible

opportunity. That may be waived under certain circumstances, but that it is both appropriate and in many instances necessary, in order to preserve the rights of the parties, that at the earliest possible opportunity to challenge them.

Before citing authorities dealing specifically with our problems, your Honor, I want to state what I think is the logic of our position. The function of a grand jury is to conduct an investigation or investigations for the purpose of ascertaining whether indictments should be returned and for returning indictments in the event that the evidence presented to the grand jury warrants such action.

If a grand jury is so constituted that it has no power to return a valid indictment, it would seem to follow, as a matter of course, that it is not a valid grand jury, that it [19] cannot effectively function, that it cannot interfere in and with the lives of citizens and other persons, require them to appear before the grand jury to testify, or for any other purpose.

I say that an invalidly constituted grand jury, having no power to return a valid indictment, is nothing more than a group of individuals sitting and using the name of the grand jury and is seeking to perform functions which they have not the power to perform. And if this grand jury, as we contend, was not selected in the manner required by law then it is just as if a group of citizens had walked in off the street, sat down and said, we are the grand jury, and if subpoenas had been issued to the persons whom I represent to appear before that group of persons. Because an invalidly constituted grand jury

has no greater power to return a valid indictment than a group of persons who walk in off the street in the manner that I have indicated.

Now, frankly, we haven't found a case on all fours. On the other hand, we haven't been able to find anything which indicates that the law is other than as I have stated it to your Honor. Everything we have found indicates—

The Court: What about the rule?

Mr. Margolis: I don't know what rule your Honor is referring to.

The Court: The rules of criminal procedure. [20]

Mr. Goldschein: Rule No. 6.

Mr. Margolis: May I see it?

Mr. Goldschein: Surely.

(The volume referred to was passed to counsel.)

Mr. Margolis: I see nothing in that rule, your Honor, which in any way is in conflict with our position.

The Court: "The attorney for the government or a defendant who has been held to answer in the District Court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

"A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. * * *"

It would seem to me that it comprehends that only a defendant, that is to say, a person who is likely to be or may be or is, or the person being investigated, one who is under charge or prospective charges, is the only one who can challenge a grand jury.

I, too, have researched the authorities and I have been unable to find anything in any of the authorities, in the [21] Federal cases or the State cases or the digest, where witnesses ever attempted to challenge a grand jury before, any more than a bystander, because, after all, a witness is no more a part of the proceedings than a bystander is.

Mr. Margolis: Before the Ballard case, your Honor, no one attempted to challenge the grand jury or the juries on the ground that they didn't contain any women.

The Court: Yes, they did.

Mr. Margolis: They may have attempted to but then the person who raised that challenge was in an even worse position than I am, because that had been attempted to be done and they were defeated on that in previous cases, under the rule that the jury was chosen in accordance with the rules of the court, and nevertheless the Supreme Court of the United States threw out the indictment.

I say here, No. 1, with respect to this rule, it does not preclude any other challenge. It is dealing with a limited subject and does not say that there are no other circumstances under which such a motion may be made.

The Court: I do not think any of the rules of law—and all of us, as lawyers, know that you do not

draft laws that way—to include some things and exclude all other things.

Mr. Margolis: That is right. I agree entirely with your Honor. [22]

The Court: Because no one can draw a law which can meet all the conceivable things that people may think of in the future.

Mr. Margolis: That is precisely so, your Honor. And this rule does not deal with the kind of a situation which is before your Honor, and therefore I say that it has no bearing on the question, and your Honor has to consider the question as it is, as a novel one that is being presented to your Honor, perhaps for the first time in any Federal Court—I do not know—but the novelty of the question, the fact that it is being raised for the first time, does not mean that it is not valid, and does not mean that it is not sound.

The Court: The novelty does not take away from the logic of the question, if the question has any logic.

Mr. Margolis: That is right.

The Court: I say, if it has.

Mr. Margolis: If it has, and we think that it has, your Honor.

We do have some authorities which indirectly, or the logic of which, your Honor please, supports us.

The Court: Let us hear them. * * * * [23]

Mr. Margolis:

Now certainly each one of these witnesses is affected by the grand jury by virtue of the fact that it is required to appear before the grand jury and testify by virtue of the fact that the testimony which they are required to give may be used against them, regardless of what the grand jury says about the

purpose of the investigation, and that they are therefore being placed in jeopardy.

The Court: How do I know what testimony they may give or which may be used against them? You cannot tell until they have been asked to testify. That question cannot possibly be here at this stage of the proceedings.

Mr. Margolis: I say this, your Honor, if they are an invalidly constituted grand jury then a witness cannot be brought in there and be required to make any sort of decision as to what he shall do under any circumstances which may face him. It is the very fact that he is being brought before the jury, being required to testify, that constitutes the injury to him, if the grand jury is an invalidly constituted body. [26]

* * * *

The Court: Mr. Margolis, suppose that a case were on trial and somebody were subpoenaed as a witness in the middle of that trial. Do you think that a witness could come in and challenge the impanelment of the grand jury on the grounds that you have asserted here?

Mr. Margolis: I would not undertake, without investigation of the law, to answer that.

The Court: What is the difference? This witness is inconvenienced. You have based your whole argument on the proposition that the witness has a right because, to wit, he is [32] inconvenienced. That witness is inconvenienced too.

Mr. Margolis: The difference between the two situations is this, which may give you the remedy in one and not in the other, that here we are coming in at the outset of the investigation before there has been any act of investigation on the part of the grand jury, which is far different from a situation in which the investigation has been completed and you are interfering in the middle of the process.

The Court: It is the right of the person. What right has the witness in connection with what the grand jury is investigating? They are here only as witnesses. They do not know whether it is the middle, the beginning or what. How do I know or how can anyone know?

Mr. Margolis: I would like to answer that question by asking a question, if I may.

If a group of citizens were to walk in here and say, we constitute the grand jury, and the United States Attorney were to say, I recognize them as the grand jury because I think they are a fine bunch of people, I think they will do what I want them to do, and he then goes out and gets some subpoenas, to subpoena witnesses in to appear before that grand jury, is it your Honor's opinion that under those circumstances an individual would have to appear and could not raise a motion to quash?

The Court: Your question as stated is too ridiculous [33] even to require an answer.

Mr. Margolis: Well, if your Honor please, I say that a grand jury that is invalidly constituted has no greater legal authority than that kind of a grand

jury, and if I am right on that proposition then my illustration is not a ridiculous one, your Honor.

The Court: Let us get to the point about the right of these witnesses here to challenge this grand jury. That is the only point that I want to hear about now. If they have that right, then I will pass to a consideration of the merits of your petition. [34]

* * * *

Mr. Margolis:

I understand, your Honor, that you want me to limit myself to that one point.

The Court: Yes, to that one point.

Mr. Margolis: On that point I have finished.

The Court: Very well. Mr. Goldscheim?

Mr. Goldscheim: Yes, your Honor. [37]

* * * *

Grand Jury.

* * * *

[38]

The Court: That seems to me to be the end of the matter, Mr. Margolis. The challenge to the grand jury is denied.

Mr. Margolis: Your Honor please, I would like to have, if I am denied the opportunity to argue further, at least I would like to have the record show that I am offering to produce evidence. I don't know whether this is in the nature of a demurrer to the motion or what the nature of this is, and I don't want to be precluded—

The Court: I take it as an objection to the granting of the motion on the ground of law which would be in the nature of a demurrer to the motion, the

ground of law being, to wit, that the persons here who are making the motion are subpoenaed as witnesses and that the witnesses do not have the power or authority or are proper parties to any challenge to the [41] grand jury or motion to quash the subpoenas. At least that is the ground upon which I am making my ruling.

Mr. Margolis: May the record show that I am prepared to proceed with proof on the motion, or in the alternative to make an offer of proof, if allowed to do so by the court, in order that by no lack of offer on my part may the record be deficient.

The Court: Do you have affidavits here?

Mr. Margolis: I haven't had time to prepare affidavits, but I am prepared to call witnesses and to submit proof.

The Court: In any event the motion on its face here would not be sufficient, nor of sufficient particularity, to proceed. It would have to be supported by larger affidavits and more facts stated in them than mere conclusions which are here alleged.

Mr. Margolis: I just haven't had time to prepare them.

The Court: Without otherwise passing on the sufficiency of your petition, I am denying it on the ground which I have just stated, to wit, that the witnesses and the parties here who are the movants are not proper parties and have no power or right to challenge either the composition of the grand jury or to move to quash the subpoena on the grounds which you have stated in summary.

Mr. Margolis: And I take it that my motion to produce evidence and to submit an offer of proof, in the event that is [42] denied, is denied by the court, is that correct?

The Court: The matter is disposed of by my denying the motions on the legal grounds, and there is nothing now before the court.

Mr. Margolis: There are other grounds of the motion, your Honor. I assume that those have not been disposed of yet.

The Court: They are all disposed of on the ground which I have just stated, to wit, that a witness cannot challenge the composition of the grand jury or raise the questions which you have raised here or attempted to raise here.

Mr. Margolis: I understand I would have an opportunity to argue these other matters, but apparently not.

The Court: They are all included within the ruling of the court, that the witness does not have the right or the power, as I have indicated, to raise the question which you have raised.

Mr. Margolis: I have a due process point, and the Blair case does not say that a witness subpoenaed before the grand jury cannot raise due process of law. I would like the opportunity to argue the point, but if your Honor has already made up his mind and my argument can't change it—

The Court: It is not a question of making up my

mind. I have made up my mind on the point I have indicated, which is sufficient to dispose of your entire petition. [43]

Mr. Margolis: Including due process of law?

The Court: Including all of the points that you have raised. And that will be the order of the court.

The witnesses are now ordered and directed to be and appear before the grand jury and testify as required in the subpoena.

Mr. Goldschein: Right now?

The Court: You told me the grand jury is in session. Is it?

Mr. Goldschein: Yes, sir, the grand jury is in session waiting. We ask that the witnesses appear.

The Court: That will be the order upon each of the parties here whose names are in the petition as witnesses, except as to Mrs. Sidney Davison.

Mr. Carter: That is right.

The Court: Do all understand that? Ben Dobbs, Philip Bock, Delphine Murphy Smith, Frank Edward Alexander, Miriam Brooks Sherman, Samuel Harry Kasinowitz, Mrs. Dorothy Baskin Forest, Mr. Henry Steinberg, Mrs. Charles Hollister Noble, Mr. Wesley Bissey, are now forthwith ordered to be and appear before the grand jury and testify in response to the subpoena, the grand jury being in session on the sixth floor of this building.

Mr. Carter: That is right, the sixth floor.

The Court: Very well. We will have a short recess. [44]

(Short recess.) [45]

October 25, 1948; 3:30 o'clock p.m.

The Court: Mr. Carter?

Mr. Carter: If the court please, the grand jury has come to your courtroom. Ten witnesses were called before the grand jury and each of them have raised the question of their privilege in connection with questions asked of them. The foreman of the grand jury has instructed the witnesses to appear here in court. I believe they are all here, and the grand jury is here, and the grand jury court reporter is here. I would like to have a determination by the court on this question of privilege.

The Court: Very well. Mr. Goldschein?

Mr. Margolis: Your Honor please, I assume this is a separate proceeding. I would like to enter an appearance. Gallagher, Margolis, McTernan & Tyre, appearing by Ben Margolis and John McTernan. On behalf of the respondents in this proceeding, I would like to make a motion for a continuance at this time, your Honor.

The Court: I do not know who the respondents are or what the proceeding is.

Mr. Goldschein: May it please the court, by direction of and in the presence of the grand jury I want to call the court's attention to ten witnesses who have appeared before the grand jury, duly sworn and asked questions which they refuse [46] to answer on the ground that it would tend to incriminate them, some for the violation of a Federal offense, others don't know what offense it may incriminate them of.

Now the ten witnesses are: Mrs. Charles Hollister

Noble, Wesley Bissey, Ben Dobbs, Mrs. Delphine Murphy Smith, Mrs. Miriam Brooks Sherman, Philip Bock, Samuel Harry Kasinowitz, Mrs. Dorothy Baskin Forest, Frank Edward Alexander and Henry Steinberg.

We would like at this time, may it please the court, to introduce the official court reporter who stenographically recorded the questions asked and the answers made by the witnesses, and ask the court to instruct the witnesses, after hearing the witnesses, that they have no constitutional privilege involved in the particular question asked of them.

The Court: Has the Clerk called the roll of the grand jury?

The Clerk: No, your Honor.

The Court: Will you do so?

(Roll call of the grand jury by the Clerk.)

The Clerk: There is a quorum present, your Honor.

The Court: And the foreman's name again?

The Clerk: Roland B. Ahlswede.

The Court: Mr. Ahlswede, you have heard the statement of the United States Attorney. Is it your desire to proceed at this time and present the matter to the court? [47]

Foreman Ahlswede: It is, sir.

The Court: Very well. You will call your reporter.

Mr. Goldschein: Mr. Drummond.

Mr. Margolis: Your Honor please, I have stated that I have a motion to make. Your Honor stated it

was premature at the time. I don't believe it is premature at this time.

The Court: We will swear the witness first.

E. L. DRUMMOND

called as a witness by and on behalf of the government, having been first duly sworn was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: E. L. Drummond.

The Clerk: Your address, office or residence?

The Witness: 106 West Third Street, Room 626.

The Clerk: Take the stand.

The Court: All right, Mr. Margolis.

Does this complete the formalities of your presentment?

Mr. Goldschein: Yes, sir, it does.

The Court: Very well.

Mr. Margolis: Your Honor please, at this time I wish to make a motion for a continuance. We do not have an affidavit in support of the motion because there simply has not been time to prepare an affidavit. I think your Honor is cognizant of the fact that these people were in court here just an hour, an hour and a half ago, and that the events upon which the [48] presentment is based, or presentments are based, occurred within the last hour. We are prepared, if your Honor desires it, to give testimony under oath, however, with respect to the basis for a continuance. However, I shall state the basis as an officer of the court.

In connection with this matter there is pertinent an indictment obtained by the office of the United States Attorney for the District of New York, in

the case of United States of America v. William Z. Foster, et al. We don't have that. We would like to have an opportunity to obtain certified copies of that indictment because they have a direct bearing upon the right to claim the privilege, your Honor please.

Second, there are newspaper reports to the effect, or there were newspaper reports to the effect, that Attorney General Clark had decided upon a course of action with respect to this indictment which was nationwide, in that he intended to obtain similar indictments throughout the United States. We have not had an opportunity to obtain either the newspaper reports, which certain of the cases indicate are in and of themselves admissible in proceedings such as this, nor the testimony of Mr. Clark to that effect that that is what he seeks, and which we will have to obtain by deposition.

Third, there have been other proceedings of a somewhat similar character in Denver and in Cleveland, concerning which we would like to adduce testimony, but we cannot do so [49] at this moment. We need to obtain either witnesses or depositions.

The Court: What do they show with relation to the privilege which counsel has stated the witnesses are standing on here in their refusal to answer questions? What would such proceedings show?

Mr. Margolis: The Denver and Cleveland proceedings or the other?

The Court: The Denver and Cleveland proceedings.

Mr. Margolis: I think the Denver and Cleveland proceedings, it is correct to state, refer to a different point, your Honor. The ones which deal directly

with the question of the incriminating nature of the evidence requested is the case of *United States v. Terry*, that I have previously referred to, and the statement of Mr. Clark, and I believe some other deputies—although I am not sure of that—that similar indictments would be sought.

The Court: I do not know the questions which have been asked. There is a provision in the statute making proceedings before the grand jury secret. I do not know how you know them.

Mr. Margolis: I am attorney, your Honor, for some of these people.

The Court: For the witnesses?

Mr. Margolis: Yes. [50]

The Court: Yes?

Mr. Margolis: I appear, your Honor, in their behalf and I did not understand that that attached to people who were seeking to obtain advice from their attorneys and who wanted to know how to proceed.

The Court: You are asking for a motion for a continuance now on the basis of some question which has been asked of these witnesses because it relates to some proceeding that is pending someplace else. I have no idea what the question was that was asked, so I cannot know whether what you are asking for has anything to do with it until I can hear at least what the question is that was asked.

Mr. Margolis: I see. I have tried to be cautious and not make my motion too late, your Honor.

The Court: Very well. Proceed to state the grounds.

Mr. Margolis: I did not want to waive my motion

by permitting the evidence to go in, but if your Honor thinks it would be better to consider it at that time—

The Court: Complete stating your grounds, or have you?

Mr. Margolis: No, I have not completed. Does your Honor wish me to state what my understanding of the questions is before there is testimony on that score?

The Court: No, if you will complete your statement of the grounds first.

Mr. Margolis: Second, if your Honor please, although [51] your Honor denied a motion to quash the subpoenas this morning on the ground that the grand jury was improperly constituted, I think the situation at this moment is quite different because these people are placed in jeopardy by reason of the existence, or the alleged existence, of this grand jury, and its alleged attempt to function. If it is functioning improperly they are now persons directly and vitally affected by the conduct of the grand jury, as are persons who have been or who are threatened with indictment on the part of the grand jury, and we therefore wish an opportunity to subpoena records and to present evidence on the question of the manner of the selection of the grand jury. I won't repeat the grounds because your Honor understands what I am referring to.

The Court: Those that are stated in your written motion filed this morning, I take it?

Mr. Margolis: Well, with respect to the matter of selection, that is correct. That is a general statement of the grounds.

The second point, we want an opportunity to show, and we think that we can establish if given that opportunity, that this investigation is not for the purpose of obtaining information at all, that it denies due process to these witnesses because it is entirely a political maneuver on the part of the Democratic Administration, instituted particularly [52] at this time with relation to the election for the purpose of attempting to influence the election, not for the purpose of obtaining any information concerning any alleged crime.

We expect to prove in this connection that these investigations are being conducted around the country, with a man being sent around the country, at least one man—maybe more than one—to conduct these investigations in various localities where they might be deemed to be helpful in the campaign.

The Court: I would say offhand that that ground is entirely immaterial, if there is a statute of the United States concerning which a violation is being investigated by the grand jury.

Mr. Margolis: That is my point, and that there is actually under way no investigation of any violation that has not come to the attention of the grand jury, or of the United States Attorney, that there is any claim or alleged violation of any law which they are purporting to violate in this area, and that the investigation does not have that purpose.

Furthermore, I want to opportunity to gather and to present evidence based upon the statement of the United States Attorney indicating that he intended to and would follow out a policy of discriminatorily applying the law against those alleged to be mem-

bers of the Communist Party; that he would seek out any alleged violations with particularity to the [53] political affiliations of persons, and not in the ordinary course and scope of investigation; that this is part of a planned policy on the part of the United States District Attorney's office to discriminatorily apply the law against persons alleged to be members of the Communist Party.

Now this is really an equal protection point, your Honor, which however is based upon the due process clause of the Fifth Amendment which, as I understand it, has as a part of it the denial of equal protection of the laws, although it does not specifically refer to equal protection of the laws.

Now with respect to all of these matters—

The Court: In that connection, all violations of all Federal laws cannot be prosecuted at the same time, it would seem to me, and the United States Attorney has a right to select the matters which he will present to the grand jury, or the grand jury themselves may of their own initiative, institute an inquiry concerning any violation of any law without the assistance or aid of the United States Attorney or the Attorney General.

Mr. Margolis: I agree with you entirely.

The Court: They are an independent, autonomous body.

Mr. Margolis: I agree entirely, but the issue here is whether, as we claim, there is a design and plan on the part of the United States Attorney's office to discriminate.

The Court: That is wholly immaterial. [54]

Mr. Margolis: If your Honor please, if it were

merely planned that these respondents were being questioned and others had not been questioned, or this inquiry was being conducted and others were being conducted, I agree that that would not be a good ground. But where we claim, and we offer to prove, that this is a planned system of discrimination.

The Court: That is, you on behalf of the witnesses?

Mr. Margolis: That is right.

The Court: And not on behalf of the defendants?

Mr. Margolis: And that the purpose of this is to discriminate against them, to penalize them because of their alleged political beliefs.

The Court: It is wholly immaterial, as I stated. The grand jury is an independent, autonomous body. They have a right to institute an inquiry and regardless of any design or motive that the United States Attorney or the Attorney General may have, it is completely immaterial. The grand jury acts on their own account and by their own vote only.

Mr. Margolis: Part of our offer of proof is that in this case they did not act on their own account.

The Court: The grand jury has not acted yet, has it?

Mr. Margolis: In conducting this investigation, this all stems out of the United States Attorney's office in Washington.

Now, I want to make it clear, your Honor, that we make our [55] motion for a continuance on all of the grounds, and I want to again refer, so that it will not be overlooked in the ruling, to the fact that we are relying upon, and we want an opportunity to obtain, a certified copy of the indictment in New

York to prove that these defendants in these cases—because I think they are defendants at this point—that these defendants in these cases have good cause to apprehend the possibility of criminal prosecution upon the theory adopted by the United States, which theory I do not agree with but that is immaterial, upon the theory adopted by the United States in the case of *United States v. Foster*.

I think we ought to have our continuance at least in order to be given an opportunity to present that evidence.

The Court: Do you wish to be heard at this time, Mr. Goldschein, in that connection, or do you wish to proceed?

Mr. Goldschein: I would like to proceed.

The Court: The motion for continuance will be in abatement until the court is informed concerning the questions.

Direct Examination

By Mr. Goldschein:

Q. This is Mr. E. L. Drummond?

A. Yes, sir.

Q. Mr. Drummond, you are the official court reporter now taking notes, the testimony of witnesses, before the grand jury? [56]

A. Yes, sir.

Q. You did—

The Court: Before you began to take your notes were you officially sworn as the reporter?

The Witness: I was, sir.

The Court: And took the oath?

The Witness: I did, sir.

By Mr. Goldschein:

Q. Did you take those notes down in shorthand?

A. I did.

Q. Did you transcribe those notes?

A. Not yet.

Q. Did you take them down accurately?

A. Yes, sir.

Q. Can you read those notes back to us now?

A. Yes, sir.

Q. All right. Did you take down the questions asked and the answers given, the questions asked by me and the answers given by Mrs. Charles Iris Noble?

A. I did.

Mr. Goldschein: Can we determine, may it please the court, whether Mrs. Noble is in the courtroom at the present time?

The Court: Is Mrs. Noble in the courtroom?

Mrs. Noble: Yes. [57]

The Court: Let us see if each one is here.

Mr. Bissey? (Mr. Bissey stood.)

Will you answer present?

Mr. Bissey: Present.

The Court: Mr. Dobbs?

Mr. Dobbs: Present.

The Court: Mrs. Smith?

Mrs. Smith: Present.

The Court: Mrs. Sherman?

Mrs. Sherman: Present.

The Court: Mr. Bock?

Mr. Bock: Present.

The Court: Mr. Kasinowitz?

Mr. Kasinowitz: Present.

The Court: Mrs. Forest?

Mrs. Forest: Present.

The Court: Mr. Alexander?

Mr. Alexander: Present.

The Court: Mr. Steinberg?

Mr. Steinberg: Present.

The Court: Very well. Mrs. Noble is present.

By Mr. Goldschein:

Q. Mr. Drummond, will you please read the questions asked Mrs. Noble and the answers given by Mrs. Noble?

A. "Q. By Mr. Goldschein: What is your full [58] name, please, Madam?

"A. Margaret Iris Noble."

Mr. Margolis: May we ask the witness to speak a little louder?

By Mr. Goldschein:

Q. The witness, after being sworn, testified as follows—

Mr. Margolis: Who is testifying here?

The Witness: Margaret Iris Noble.

The Court: Was the witness sworn?

The Witness: Yes, sir; sworn to tell the truth.

The Court: Very well. Now start over again with the questions and answers.

Mr. Margolis: May we ask the witness to speak a little louder?

The Witness: I will try.

"Q. What is your full name, please, Madam?

"A. Margaret Iris Noble.

"Q. Where do you live?

"A. Sherman Oaks, 15041 Sherman Oaks, Delgado Drive.

"Q. Mrs. Noble, just so that you understand your

position here, let me state this, that the grand jury is not investigating you. You are merely subpoenaed here as a witness to give what evidence [59] you know. Do you understand that?

“A. Yes, I understand.

“Q. Now, in connection with that, let me ask you: Do you know the names of the county officers of the Los Angeles County Communist Party?

“A. I refuse to answer that on the ground that it may incriminate myself.

“Q. Do you know what the word incriminate means?

“A. I think so.

“Q. What?

“A. I think so.

“Q. You are saying in substance that the answer you would give will tend to involve you in the commission of a Federal crime. You haven't committed any crime, have you?

“A. I don't know. I would have to talk this over with my lawyer. But I am sure that I understand the word incriminate.

“Q. All right. Do you know the table of organization of the Los Angeles County Communist Party?

“A. I refuse to answer that question on the ground that it might incriminate myself.

“Q. What is your occupation? What do you do?

“A. I am a housewife.

“Q. What is your husband's first name? [60]

“A. Charles.

“Q. Charles Noble. What is his occupation?

“A. I refuse to answer that on the ground that that may incriminate myself.

“Q. You really don’t mean that, do you?

“A. He is a writer.

“Q. Where is he employed?

“A. Free lance writer.

“Q. Do you know Mr. Ned Sparks?

“A. I refuse to answer that on the ground that it may incriminate myself.

“Q. Do you know Mr. Vincent Russo?

“A. I refuse to answer that on the ground that it might incriminate me.

“Mr. Goldscheim: All right. You are not excused, but we will recess you. Will you wait in the adjoining room, please?”

Mr. Goldscheim: Now, may it please the court, we insist that there is nothing in any of those questions that could possibly tend to incriminate the witness for any crime against the United States Government. We ask respectfully that the witness be given an opportunity to explain to the court, either from the witness stand or privately outside of the hearing of government counsel, so that she may advise the court and the court be in a position to determine whether or [61] not the answers to the questions would tend, or may tend, to incriminate the witness for the violation of a Federal offense.

Now the court heard the witness asked whether or not she knows the names of two individuals, and she claimed the privilege against self-incrimination with reference to answering the question on either one.

The Court: And two other questions.

Mr. Goldscheim: The last two questions, does she know Ned Sparks, does she know Mr. Vincent Russo, and the court heard Mr. Vincent Russo introduced

here this morning as a special assistant to the Attorney General, showing, may it please the court, how ridiculous is the answer of the witness and how each of them, the court will note, makes the same answer to those particular questions, which tends to prove that the intent of these witnesses is the intent to answer them in the manner that they have and is by concerted agreement.

The Court: The question is whether or not it is contumacious and that turns upon whether or not the answer which they might give might tend to incriminate them, as disclosed by the question, or if they desire to give the court information aside from that contained in the question as may be disclosed by the information they may give to the court.

Now, is it your desire to proceed by putting on the testimony given by each of the witnesses? [62]

Mr. Goldschein: Yes, your Honor.

The Court: And then, Mr. Margolis, do you wish to be heard concerning each of them as they arise or all of them at the conclusion?

Mr. Goldschein: I think, may it please the court, that it could be handled much more orderly if each witness were handled individually so each may be given the opportunity to explain or refuse to explain.

The Court: Very well.

Mr. Margolis: Does your Honor care to hear from us on that subject?

The Court: Just a moment. Mrs. Noble, will you come forward, please.

Mr. Margolis: Your Honor please—

The Court: Just a moment. Come on inside the rail.

Is Mr. Margolis your attorney in this proceeding?

Mrs. Noble: Yes.

The Court: Very well, Mr. Margolis.

Mr. Margolis: I think that all of these can be handled most expeditiously together, because the grounds are all of a similar character, as your Honor undoubtedly can guess from the fact that it was a single investigation and all these people were subpoenaed together.

We think that it can best be handled together because our reasons are the same in each of the cases, and we want at [63] this time to renew our motion for a continuance. I can tell your Honor at this time the substance of what I know about the substance of the indictment which was obtained in New York City, about which—

The Court: Let me see. There are four questions here: Do you know the officers of the Communist Party in Los Angeles—was that the first question?

The Witness: The Los Angeles County Communist Party.

The Court: Do you know the table of organization, do you know Ned Sparks, do you know Vincent Russo. Those are the four questions?

Mr. Margolis: That is right.

The Court: Very well. Now your motion is to continue it in order that you may get a copy of the indictment against William Z. Foster and others?

Mr. Margolis: That is right, your Honor. I may tell you what our theory is.

The indictment in that case was directed against

Foster and others because of their membership and activities as members and officers of the Communist Party, including such things as attending a convention, including, if your Honor please, the distribution of literature, including the things such as attending committee meetings, such as setting up separate sections of the Communist Party in various parts of the country. [64]

It is our contention, and we are prepared primarily at least to cite authorities to support us, although we want more time to thoroughly prepare and present to your Honor the authorities, it is our position that anything which tends to connect an individual with the Communist Party, in view of this indictment, is something which the witness need not answer upon the grounds that it might incriminate him.

I refer particularly to the case with which your Honor may be familiar—

The Court: How can the answer to the question, do you know the officers of the Communist Party of Los Angeles County, connect the witness with the Communist Party, or do you know the table of organization?

Mr. Margolis: Because that can be a link, if the court please.

The Court: That can be a what?

Mr. Margolis: That can be a link in a chain of evidence tying a person up into either affiliation with, activity with, or membership with the Communist Party.

The case of *Counselman v. Hitchcock*, which I think is 142 U.S. 547, which is the leading case on this point, supports the proposition that this privilege

against self-incrimination extends to refusal to answer any question which tends to establish any element of an offense or to furnish evidentiary leads from which evidence tending toward guilt may be obtained. [65] I would be glad to read portions of the case to your Honor, but as I understand it now we are concerned primarily with the question of the continuance rather than a thorough argument on the law.

The Court: Yes.

Mr. Margolis: If there is a possibility, as we intend to show by these indictments, that persons may be incriminated by virtue of membership in the Communist Party, then if a—

The Court: What about the Schneiderman case?

Mr. Margolis: Just a moment, your Honor. I will answer the Schneiderman case later.

The Court: In that case, by virtue of membership in the Communist Party the court pointed out that it was a matter of individual action and not a membership in an organization such as the Communist Party was supposed by then to be at the time.

Mr. Margolis: I will come to that in a moment. My point is that if it might be incriminating to be a member of or affiliated with or active on behalf of the Communist Party, and anything which even gives an evidentiary lead to that question, is something which need not be answered and against which the privilege may be claimed.

The Court: What statute are they accused of violating in the Foster case? [66]

Mr. Margolis: In the Foster case they are accused

of violating Section 2 of the Act of June 28, 1940, commonly known as the Smith Act.

The Court: What does that require?

Mr. Margolis: It is Section 10, Title 18 of the United States Code. It may be a different section in the new edition, your Honor.

The Court: When was the indictment brought, before September 1st? (Examining citation.)

Very well.

Mr. Margolis: Now, I am informed something that I didn't know about, that in addition to the indictment that I have referred to, which exists in New York, there are 12 individual indictments which are based solely upon membership in the Communist Party. I would say that these questions—I will come to the Russo question in a moment—that these questions might tend to furnish evidentiary leads and, if so, the privilege might be claimed.

Now as far as the Schneiderman case is concerned, the government is not in a position to claim the benefit of the Schneiderman case. We think the Schneiderman case is a correct decision, that it ought to be the law of the land today, but the government is not recognizing the Schneiderman case as the law of the land today. It is indicting people despite the Schneiderman case, and under the case of *Counselman v. Hitchcock*, [67] an individual has the right to claim the privilege against self-incrimination if there is a possibility of his being indicted as a result of either his testimony, evidentiary leads obtained by his testimony, or where his testimony constitutes the slightest bit of evidence which can be used as part of the basis of obtaining an indictment against him.

And it doesn't make any difference whether the indictment is good or is bad, if there is a possibility of an indictment being taken against him, then the very question that the person may be deprived of his liberty temporarily, may have to put up bond, may be forced to defend himself, is sufficient to entitle him to claim the privilege against self-incrimination.

If today it were true that the government of the United States, through the United States Attorney General's office, the very office which is acting here, had consistently taken the position that the Schneiderman case prevented the issuance of such an indictment, then we would have an entirely different question here, one in the nature of the one your Honor presents, but the situation, and what we want to prove, we don't have the certified copies of the indictment here, we couldn't have had them here by this time, but what we want to prove is that the government has not taken this position and if these people testify in response to these questions there is a danger that they may be furnishing evidentiary leads, [68] there is a danger that they might be furnishing particles of evidence which might tend to incriminate them under that theory. That is our position.

Now on the question of Vincent Russo, if each of these defendants had been asked—

The Court: You are arguing the merits now or to your continuance?

Mr. Margolis: Except that your Honor might be able to dispose of the Vincent Russo matter.

If the witnesses had been asked, do you know Mr. want to consider granting a continuance, we might

Vincent Russo who is sitting here, and he had been pointed to and identified, that might be a different question, and they might be ordered to answer that question, but they weren't asked that. No evidence has been presented that this Mr. Vincent Russo is the only Vincent Russo who exists, that there isn't another Vincent Russo in the United States, that there isn't another Vincent Russo in Los Angeles, or knowing him or any connection with him might not be an evidentiary lead. It is precisely the sort of thing that the government could utilize in obtaining an indictment similar to the one obtained in the case of *United States v. Foster and Dennis*. The name of the case is *United States v. Foster*, of course.

I do not want to have this argument considered as a complete argument on the merits. I am merely making this as an [69] argument on my motion for a continuance and ask for a ruling on that at this time.

The Court: Very well.

Do you wish to be heard further, Mr. Goldschein, in connection with the motion for a continuance?

Mr. Goldschein: We are objecting to the motion for a continuance and for reasons I would like to state as follows:

There isn't any basis of course for the statement of Mr. Margolis, to get up here and simply state that the government is making a crusade against anyone. That is ridiculous.

It is also ridiculous to say that the questions asked the witness here is the beginning of a chain that may lead to something that may tend to incriminate him, any more than asking the witness what his name is.

There isn't anything more to the question asked, does he know the names of the officers of the Los Angeles County Communist Party—

The Court: You are arguing the merits now. Counsel has argued again that the matter ought to be continued in order that he may be able to produce before this court a certified copy of the indictment brought someplace in the East, United States v. Foster, because that will reveal that somebody was indicted because they knew something about the Communist Party, and so on.

What you to say as to that?

Mr. Goldscheine: I was just leading up to that. I am [70] coming to the proposition of what would tend to incriminate the witness.

Now Mr. Margolis informs us here that these witnesses before the grand jury are Communists, by inference, that the Attorney General is after these people, and the inference is that they must be Communists.

Mr. Margolis: There is no such inference. Maybe counsel wants to infer that.

The Court: What is the difference?

Mr. Margolis: I don't think counsel should be allowed to talk to the press this way.

The Court: I do not see how I have been able to prevent either counsel from doing so.

Mr. Goldscheine: May it please the court, the New York indictments, as I understand them, are based on the Smith Act which prohibits advocating the overthrow of the government by force and violence, or counseling or encouraging any organization that advocates the overthrow of the government by force.

Today there is no statute that makes it a violation of the law to be a member of the Communist Party. Now the Schneiderman case and the Barsky case both stand for that principle.

It might be interesting to note that five witnesses in Denver were held for contempt for refusing to answer questions more direct in connection with their Communist activities. [71] One refused to answer whether or not she was a member of the Communist Party. Others refused to answer, after making the statement that they were members of the Communist Party, questions relating to other people that they knew.

More interesting than that is the fact that the Circuit Court of Appeals denied bail last Thursday on the matter that there was no substantial question of law involved from the bench.

Now these witnesses haven't come to the point as to whether or not they are members of the Communist Party or whether they have taken any active part in the Communist Party, and nobody has been asked the question as to whether or not they advocate the overthrow of the government by force. The grand jury hasn't touched on that question.

The New York indictment has absolutely nothing to do with this question at bar.

The Court: I am satisfied that it does not, counsel. The motion for a continuance is denied.

Mr. McTernan: Would you hear from us a moment longer on this question, because I think there is a serious matter raised by Mr. Goldschein's argument.

The Court: It is solely on the question of whether or not the Foster indictment is material here.

Mr. McTernan: I don't think that is the only question.

The Court: That is the question. [72]

Mr. McTernan: If we could have time to submit proof to your Honor in support of the position which the witnesses have taken before the Grand Jury, part of our proof consists of the New York indictment.

The Court: Assuming that the indictment is, as you say, that it is for a violation of this Section 10 of Title 18 of the United States Code, I cannot see how it could possibly affect the right of the witness to refuse to answer the question on the ground that she might be incriminated, any one of the four questions that are here. Now this is the point that is involved here, and the question of the continuance.

Mr. McTernan: Your Honor, I don't want to be disrespectful, but I think the matter has been presented to you by the Special Assistant to the Attorney General in the wrong way. The question is not—

The Court: You mean in a convincing way?

Mr. McTernan: In the wrong way, your Honor. Counsel has not called your attention to the law which governs this matter.

The Court: Very well. What is it?

Mr. McTernan: The law which governs this matter is the provision in Title 18, Section 10, which

makes it a crime to be a member of an organization that advocates the overthrow of the government by force and violence. His office, which has brought indictments in controvention to the Schneiderman [73] case, which claims that membership alone in that organization is membership in an organization which violates Section 10. In other words, membership and membership alone in the Communist Party, according to the Attorney General of this country, constitutes membership in an organization which advocates the overthrow of the government by force and violence.

What this witness is claiming is a privilege against a question which might tie her in with the Communist Party because, as we will prove to your Honor if we are given the opportunity through this continuance, simply membership alone was enough to indict 12 individuals in New York City, not on a joint indictment of conspiracy, but on individual indictments, your Honor, which charged that these people were members of such an organization, to wit, the Communist Party.

In other words, it is said in the indictment that they are members of an organization which advocates the overthrow of the government by force and violence, to wit, the Communist Party, knowing it to be such.

Now we submit to you that any question which elicits from a witness her knowledge, her personal knowledge, your Honor, she is not being asked to testify to hearsay, to her personal knowledge as to who the county officers are, to her personal knowl-

edge of an organizational chart, is a question which will tie her in with the Communist Party and subject her to a reasonable risk of prosecution, which is what the [74] Court says is the test under such case as *Counselman v. Hitchcock* and *United States v. Weisman*.

We are asking simply for an opportunity to make this record complete. We don't see how your Honor can adequately decide this question, and it means a decision which affects the liberty of this individual, without having a complete record.

For example, in the *Weisman* case, which is cited in 111 F. (2d) 260, there perfectly innocent questions were asked the witness and he was allowed to show the existence of an indictment against other people, a plan on the part of the United States Attorney's office to bring indictments against other people which could include him. With that proof in the Court, the opinion being written by Justice Learned Hand—

The Court: What about the *Barsky* case, where the Supreme Court sustained the contempt conviction for refusal to answer the direct question whether or not they were a member of the Communist Part or believed in Communism?

Mr. McTernan: The *Barsky* case specifically points out that the privilege against self-incrimination is not involved. They were discussing simply the power of a legislative committee to ask such a question, the privilege against self-incrimination not having been claimed at the time the questions were put—as a matter of fact, questions were not put—and the question of self-incrimination not having

been [75] raised before the Court. The Barsky case has nothing to do with what is before your Honor. All we are asking is a chance to make a record on which the liberty of this individual will be determined.

We submit to you that we will have a record, if you will give us enough time, which will be virtually identical with the record in which Judge Learned Hand in the Weisman case held entitled the witness to claim his privilege.

The Court: The motion for a continuance is denied.

Mr. Margolis: Are we proceeding with one case at a time?

The Court: Yes.

Does the witness at this time wish to make a statement to the Court out of the presence of the Grand Jury and out of the presence of the United States Attorney's office in explanation of her refusal?

Mr. Margolis: We are prepared to make whatever showing we have here in open court, your Honor.

The Court: You are answering for the witness, that she does not?

Mr. Margolis: That is right.

The Court: Is that correct?

Mrs. Noble: That is correct.

Mr. Margolis: Your Honor, I want to make an offer of proof at this point. I have here one of the indictments and [76] I want to offer to prove that sometime during the year 1948—I do not have the

exact date but it was within the past several months—in the District Court of the United States, for the Southern District of New York, there was returned an indictment in Case No. C-128-87, entitled United States of America v. William Z. Foster, Eugene Dennis, also known as Francis X. Waldron, Jr., John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, also known as Israel Regenstrief, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, also known as Arno Gust Halberg, reading either as follows or substantially as follows—I offer to prove that it reads as follows:

“The Grand Jury charges:

“1. That from on or about April 1, 1945, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere—”

Mr. Goldschein: I have a copy of that indictment, if it will save time.

The Court: Let counsel look at it and, if agreeable, you may pass it up to me.

(The document referred to was exhibited to counsel.)

Mr. Margolis: Could we have a stipulation that this is a true and correct copy of an indictment—do you know what date it was issued in New York? Within the past several [77] months?

Mr. Goldschein: Yes.

Mr. Margolis: And now pending?

Mr. Goldschein: Yes, if you wish.

Mr. Margolis: I understand there is such a stip-

ulation. I ask that this document be marked defendant's exhibit—

The Clerk: A.

Mr. Margolis: A, and offer it in evidence, your Honor.

(The document referred to was passed to the Court.)

The Court: Very well. I have read it.

Mr. Margolis: We also offer to prove, your Honor please, that—is that admitted in evidence?

The Court: Admitted.

(The document referred to was received in evidence and marked Respondent's Exhibit A.)

[Printer's Note: Respondent's Exhibit A is identical to Defendant's Exhibit A, set out in full at page 327, Vol. II., of this printed record.]

Mr. Margolis: We also offer to prove that there is now pending in the same Court 12 individual cases entitled United States of America v. William Z. Foster, United States of America v. Eugene Dennis, and so forth and so on, in which 12 cases each of the defendants named in Defendant's Exhibit A are individually charged solely with membership in the Communist Party, an organization it is alleged that teaches and advocates the overthrow and destruction of the United States by force and violence [78] .

We have asked counsel if he has copies of those

indictments here and he says he does not have. We submit this as an offer of proof, not because of our inability to prove this if a continuance were granted for that purpose, but simply because we do not have it here and it would take perhaps two or three days by wiring tonight to get back certified copies of those indictments—maybe four days. That is the reason for offering to prove that.

We also offer to prove that with respect to all of these indictments, in other words, the indictment, Defendant's Exhibit A and these others which we have mentioned, a motion or motions to dismiss them were denied in the United States District Court within the last several days.

Will counsel be willing to stipulate to that?

Mr. Goldschein: No, sir.

Mr. Margolis: Apparently counsel thinks this is more serious than he has indicated or he would be willing to stipulate. That is a fact. It has appeared in all of the papers, and we would like an opportunity to get a certified copy of the order denying the motions to dismiss or the orders denying the motions to dismiss in each of these cases.

We make it as an offer of proof solely because we are denied the opportunity to obtain them.

We also would like to offer to prove that these cases, all of them referred to, are now set for trial, or at least [79] up until a day or two ago were set for trial, for November 1st or 2nd, 1948, and are presently pending in the status that I have indicated in the United States District Court.

If we were allowed time to obtain a continuance

we would prove, and we hereby offer to prove, the following—

The Court: The motion for a continuance has been denied. We are talking about the merits of it now.

Mr. Margolis: I understand that, but I want the record to be clear, that the reason that this is an offer of proof and is not—we are not presenting evidence—is not because of any inherent inability on our part to present this evidence, but simply because we cannot have it here at this moment in view of the fact that the defendants in this case were served at 7:00 a.m. this morning and since then, as your Honor knows, we have been pretty well occupied. That is my only reason for continuously referring to the denial of the continuance.

We offer to prove through the testimony of the Attorney General, through newspaper reports, through other witnesses, that the Attorney General of the United States has announced that it is his plan and intention to obtain a series of indictments throughout the United States of America, including specifically the City of Los Angeles, charging persons with violation of Section 2 of the Act of June 28, 1940, commonly known as the Smith Act, and that said indictments will be based [80] solely upon the proposition that the individuals are members of or alleged to be members of the Communist Party.

Your Honor please, we now have—Mr. Goldscheine told us originally he didn't have it but apparently found it in his files—a copy of one of the

original indictments, of one of the indictments of which I said there were 12 against different individuals.

Mr. Goldschein: This is a copy.

Mr. Margolis: This is a copy, and I understand that he is willing to stipulate that this is a true and correct copy, and that there are 11 other indictments similar to this, except for the name of the persons involved.

Is that correct?

Mr. Goldschein: That is correct.

Mr. Margolis: Mr. Goldschein has indicated that he will so stipulate, and may the record so show.

I offer this document as Defendant's Exhibit B.

The Court: It will be received in evidence.

(The document referred to was received in evidence and marked Respondent's Exhibit B.)

[Printer's Note: Respondent's Exhibit B is identical to Defendant's Exhibit B set out in full at page 331, Vol. II., of this printed record.]

Mr. Margolis: May it be deemed that my offer of proof as to the Attorney General's statement of intention and intended action, which refer to 12 indictments concerning which I made an offer of proof, are intended now to refer to Defendant's Exhibits A and B? In other words, I made an offer of [81] proof which I referred to before Defendant's Exhibit B was in evidence. So shall I repeat it in order to keep the record straight?

The Court: You mean your offer is to prove by

the Attorney General's testimony that he said he was going to go about the country, including specifically Los Angeles, and indict people on indictments similar to your Exhibit B?

Mr. Margolis: A and B.

The Court: A and B, for being members of the Communist Party?

Mr. Margolis: That is right. That he has so announced and that it is his contention so to do.

We also offer to prove in this connection that the Attorney General has found under the loyalty check order—I don't know the exact designation of the order—Executive Order 9835, that the Communist Party is an organization which advocates the overthrow of the American form of government by force and violence, that there is a specific administrative finding to that effect. Again we say, contrary to the Scheiderman case. There it is.

We also offer to prove that the Attorney General's office is proceeding throughout the United States to institute and carry into effect deportation proceedings against numerous individuals upon the theory that the Communist Party is an illegal organization, one which advocates the overthrow of the [82] government by force and violence, and that mere affiliation with the Communist Party is a sufficient basis for deportation.

We offer to prove that the Attorney General of the United States has made the statement on a number of occasions that it is the policy and position of his office that anyone who is a member of the Communist Party has violated this section of

the Smith Act, and that this is the official policy of the Government of the United States, upon the basis of which it intends to act in the future and at least, and in addition, that this is the announced official policy upon the basis of which the Government of the United States intends to act in the future.

On that phase of it, your Honor, that completes our offer of proof, but at this time we would like to call as a witness the clerk of the jury commission to take testimony on another point. We haven't had a chance to subpoena him, but he is probably available.

The Court: That is on the point of the organization of the Grand Jury?

Mr. Margolis: That is right, your Honor.

The Court: Under my ruling this morning, and I still adhere to it, a witness cannot challenge the organization of the Grand Jury.

Mr. Margolis: Will I have an opportunity to make an offer [83] of proof on that point, your Honor?

The Court: Make your offer of proof.

Mr. Margolis: I offer to prove, your Honor please, that the Grand Jury in this particular case was selected from a panel which was in turn selected by the jury commissioner and the clerk of the court in a manner not calculated to achieve a representative cross-section of the community, in that among other things names for persons on that panel were obtained from golf clubs, society clubs, social registers, and similar sources of individuals

in the higher economic brackets, and that names were not obtained from sources in the lower economic brackets in the same manner that they were from sources in the higher economic brackets.

We offer to show that in the selection of names from the telephone book, which was used as one manner of selection, one source of selection, certain areas of the community in which persons in the lower economic brackets lived, were consistently and repeatedly and constantly discriminated against, and that the selections were made overwhelmingly from the sections where persons in the higher economic brackets live.

We also offer to prove that the composition of this Grand Jury, of the panel from which it was selected, is such that there is absolutely no possibility, no reasonable possibility, that the Grand Jury was selected in a manner calculated to achieve a representative cross-section of the community, and [84] that the very results of the selection, by virtue of the fact that the composition of the Grand Jury and of the panel from which it was selected indicate the discrimination to which we referred.

Now I could give a more detailed offer of proof if necessary.

The Court: Do you have an affidavits to offer in support of your charge?

Mr. Margolis: I would like to have an opportunity to prepare them, your Honor. I just have had no opportunity to prepare such affidavits, and I hereby renew my motion for a continuance to prepare such affidavits.

The Court: The motion is denied. I will adhere to the ruling I made this morning in the Blair case, that the witness has no right or privilege to challenge the composition of the Grand Jury before whom he is called as a witness.

Does that conclude your presentation?

Mr. Margolis: No, your Honor, it does not.

As I understand your Honor's ruling, it is not based upon my failure to furnish affidavits, that your Honor does not deem that I have been negligent, or counsel for these defendants have been negligent, or would have had any possibility within the time—

The Court: My ruling is that the witness has no legal standing. [85]

Mr. Margolis: Well, your Honor asked for affidavits and I wondered.

The Court: No, I did not. I asked if you had any. I do not want anything. [85-A]

Mr. Margolis:

In connection with our other defenses, your Honor, we offer to prove that the grand jury is not conducting a bona fide investigation within the scope of its powers in that the investigation herein was instituted by the office of the Attorney-General of the United States.

The Court: That is a repetition of the ground which you urged before, is it not?

Mr. Margolis: That is right, but I urged them previously as a basis for a continuance. I want to now make my record entirely clear. Does your Honor wish me to refer to the grounds I urged before?

The Court: I think if you merely state them,

They are the same grounds? You are now offering them on the merits, is that correct?

Mr. Margolis: Yes. And we offer specifically to produce evidence to support these grounds, your Honor, if given an opportunity to do so.

The Court: Very well.

There will be the same ruling, to the effect that the witness has no legal standing to challenge the composition of institution of the grand jury on the grounds which are set forth in the written motion.

Mr. Margolis: I think that the record ought to be clear, your Honor, that these people who you are referring to as witnesses are now defendants before your Honor. [86]

The Court: They are respondents. They are not defendants.

Mr. Margolis: This is a proceeding of a criminal nature, as I understand it, and they have the same status as a defendant.

The Court: No, I do not know that it is a proceeding in the nature of a criminal proceeding.

Mr. Margolis: I would like, if we had time, to have an opportunity to present authorities to you on that point.

Now may I have some time to argue the law?

The Court: What have you been arguing?

Mr. Margolis: I have made a preliminary argument, your Honor. This is a matter of very vital importance.

The Court: I understand that it is a matter of vital importance.

Mr. Margolis: At the time that I presented the

any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government'';

Is that a political party?

Mr. Margolis: I say this, I defend no political party, but what has happened——

The Court: I do not understand counsel. You said a moment ago that these people would incriminate themselves because they would show some connection by their answer with the Communist Party, and that they were indicted for being members of the Communist Party. The indictments show on their face that they are brought under this section which I have just read, and now you say it is a political party.

Mr. Margolis: That the Communist Party is a political party? The Schneiderman case has said so. I go along with the Supreme Court on that.

The Court: How could they be incriminated if they said they were a member of a political party?

Mr. Margolis: If the United States Attorney-General's office also went along with the Schneiderman case they would not be incriminated. But the United States Attorney-General's office has abandoned the Schneiderman case. That is precisely the point I am trying to make. [94]

The Court: If your position that any answer here which might be given to any of these questions would merely disclose that they were or were not a member of a political party, it seems to me that we need not waste any more time and the witness should answer the question.

If your position, however, is that the answer she may give may tend to incriminate her, that again is something else. You may proceed.

Mr. Margolis: Our position is simply this, your Honor, that the Attorney-General is prosecuting members of the Communist Party upon the theory of the Communist Party advocates this. We think that the Attorney-General's office is violating the Schneiderman case, but that makes no difference as far as the claim of privilege is concerned. If the Attorney-General's office is prosecuting people because of their membership in the Communist Party, or their claimed membership in the Communist Party, then there is a right to claim the privilege even though the Attorney-General's office is wrong. [95]

* * * *

The Court: I do not read the Schneiderman case as you contend in connection with this matter. The Schneiderman case is authority for the proposition that guilt is personal regardless of any membership in any party.

Mr. Margolis: That is correct.

The Court: Or any organization.

Mr. Margolis: That is correct.

The Court: That mere membership in an organization does not itself create guilt, that it must be personal.

Mr. Margolis: That is right.

The Court: Therefore it seems to me that the Schneiderman case is authority for the position taken by the government here.

Mr. Margolis: If your Honor please, the Schnei-

derman case holds two things: the Schneiderman case holds, first of all, that there was no evidence presented sufficient to establish that the Communist Party advocated the overthrow of the government by force and violence and, second, as your Honor has stated, that guilt is personal. But the Attorney-General's office has abandoned that position and now takes the position——

The Court: They are not abandoning it, they are asserting here that insofar as this proceeding, so far, that it is a personal matter, that these questions do not incriminate [96] this woman here who is called as a witness, Mrs. Noble, because there is no personal connection showing a guilt.

Mr. Margolis: They may take that position here, but they take other positions elsewhere. Therefore, there is a danger of incrimination.

The Court: Let me ask you this: The question to the witness, the first question is, do you know the officers of the Los Angeles County Communist Party. If the witness answers "No," would she incriminate herself?

Mr. Margolis: No.

The Court: She would not?

Mr. Margolis: That is right.

The Court: If she answered "Yes" then she might incriminate herself?

Mr. Margolis: That is right.

The Court: Of what?

Mr. Margolis: That might be one item, either an evidentiary lead or one item in a chain of evidence

leading to prove membership with or affiliation with the Communist Party.

The Court: I cannot go along with you. Unless you have some other legal proposition to offer, I cannot hear you any further.

Mr. Margolis: I haven't finished the case.

The Court: What case? [97]

Mr. Margolis: I haven't finished the case of *Counselman v. Hitchcock*, but I also have the case of *United States v. Weisman*, which is reported in 111 F. (2d).

The Court: That is the case which you referred to a few moments ago?

Mr. Margolis: Yes. Mr. McTernan did, I didn't.

The Court: Very well.

Mr. Margolis: That is 111 F. (2d) 260.

Your Honor please, the question in that case was—I don't have the exact language of it, but it was something like this—did you visit Shanghai, or did you know anybody who visited Shanghai during a certain period of time. Now obviously, your Honor, nobody is incriminated by visiting Shanghai or by knowing somebody who visited Shanghai. There isn't the remotest possibility that the answer to that question standing alone is a self-incriminating one. Yet in that case the witness refused to answer the question—I will wait until your Honor is finished reading.

The Court: Well, counsel, I cannot see how that case supports you. The doctrine in it is that the witness must show how it would incriminate him. In this case the witness offered to produce an indictment wherein certain specific events, the date and

time, about which questions were asked him. Now what have you to show here where this witness who was asked this question, if she answers this question, it [98] would cause her to be indicted or related or connected with any crime?

Mr. Margolis: I am going to let Mr. McTernan handle that. My voice is getting hoarse.

The Court: Of course we cannot go on in relays here forever, counsel. I desire everyone to have a full opportunity to be heard, but——

Mr. McTernan: Your Honor, please, this rush with which the Attorney-General has conducted these proceedings hasn't given us an opportunity adequately to prepare for this, and we have been forced to draw on whatever knowledge we have from the decisions. It happens that I am more familiar with the Weisman case than Mr. Margolis.

There were two questions there, your Honor. One was the matter of receiving cablegrams at Murray's Restaurant in New York, and the second one dealt with having visited or knowing anyone who visited in Shanghai during a certain period of time.

I would like to direct your Honor's attention to the second of those questions first because, as Judge Learned Hand points out, this question was the most innocent seeming on its face.

The Court: Yes, I know, but he said it directly pointed to the defendant and it would certainly have disturbed any but the most hardy, and so forth. In other words, the person [99] who is claiming the privilege offered to produce, and did produce, and the lower court refused to receive it but Judge Hand

held improperly so, documentary evidence showing that if they had answered that question it would have connected them with a crime.

Mr. McTernan: That is exactly what we have proven here, or offered to prove. That is why the Weisman case we think controls this situation.

What happened in the Weisman case was this, there had been an indictment against 30 other people, not Weisman but 30 other people. There had been a statement by the United States Attorney that he was thinking of bringing more indictments, and he described one of the prospective indictees in terms which came pretty close to Weisman.

Now what have we proven here? We have proven indictments of 12 people based upon their formation of the Communist Party. We have proven 12 individual indicements against the same individuals based upon their membership in the Communist Party as a violation of the Smith Act.

Now we also offer to prove that these very gentlemen who sit here, claiming that there is no possibility of incrimination involved in this question, or these questions put to this witness, have announced an intention of conducting grand jury investigations and bringing indictments of a similar tenor in other cities of the United States, including Los [100] Angeles.

Now whether the Attorney-General is controlled by the Schneiderman case or not, or whether he should be or not, the fact is that in the Attorney-General's opinion, and it is the administrative policy of the chief law enforcement agency of the United States,

that membership in the Communist Party alone constitutes a crime under the Smith Act.

The Court: Is that what they charge here?

Mr. McTernan: Yes, your Honor. That is exactly what they charge there. If you will read particularly the short indictment again, I think it was in the name of Foster, you will see my point.

The Court: “* * * well knowing during all said period * * * In other words, it is knowingly.

Mr. McTernan: Of course that is part of the element of the crime, knowing membership. But this might prove knowing membership, your Honor, because it tends to prove membership. As the court pointed out in the Weisman case, and as the court pointed out in all of these cases, the answer to the question must need not be an admission of a completed offense, or even an admission of an essential element of the crime, it need only be an admission of a link in the chain of evidence or a point indicating that here lies a crime and that this person is involved in it. That is all that is needed to claim the privilege under the Constitution of this [101] country.

Now let's take this from another angle, your Honor. These gentlemen have said to you that there is no statute making it a crime to be a member of the Communist Party, and of course that is true, but that has nothing to do with the case. There was no crime saying that Weisman couldn't deal with narcotics. There was no law or statute making Mr. Counselman a criminal because he shipped goods on a railroad. They defined a broad offense, such as the Smith Act defines. These people have taken the posi-

tion, the Attorney-General has taken the position, that membership in an organization alone constitutes an offense under that statute. Any evidence which shows, or tends to show, or tends to link a witness with that organization, raises a reasonable likelihood of criminal prosecution, as Justice Learned Hand said in the Weisman case, a reasonable danger, and that is all that we have to point out here to you in order to justify the claiming of the privilege in this case. [102]

* * * *

The Court: Very well. Do you wish to be heard further, Mr. Goldschein?

Mr. Goldschien: I just want to call the court's attention to a case the court may be interested in hearing about.

The Court: If it goes to the point I would.

Mr. Goldschein: It is exactly in point. It is the case of *Mason v. United States*, in 244 U. S. That follows *Counselman v. Hitchcock*.

The Court: And modifies it?

Mr. Goldschein: And modifies it. [103]

In this case, may it please the court, a witness under a statute in Alaska was asked before the grand jury, did you see any gambling in a certain place on a certain night, and the witness claimed his privilege against self-incrimination, and the question went up, and the court said that there was no statute in Alaska that made it a violation of the law to see gambling, and the witness was therefore in contempt for not answering the question, and it was affirmed by the Supreme Court of the United States.

In affirming it, may it please the court, they set out and quote the opinion of Chief Justice Marshall in the Aaron Burr case, and may I read that portion of it that I think pertinent to the case at hand that counsel did not read:

“During the trial of Aaron Burr, in re Willie, 25 Fed. Cas. No. 14,692e, page 38, 39, the witness was required to answer notwithstanding his refusal upon the ground that he might thereby incriminate himself. Chief Justice Marshall announced the applicable doctrine as follows: ‘When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every [104] citizen is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which it is conceived courts have generally observed. It is this: When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may incriminate himself, then he must be the sole judge what his answer would be.’

“The constitutional protection against self-incrimination ‘is confined to real danger and does not ex-

tend to remote possibilities out of the ordinary course of law.' "

Now that is as clear a statement of the law today as we can find, and is exactly what this court said at the outset in offering to hear the witness so that the witness can advise this court on just how the answer to that question would tend to incriminate her for the violation of the federal offense and which they have refused to do.

The Court: Very well. [105]

I cannot see how any of the legal propositions put forward by Mr. Margolis and Mr. McTernan on behalf of the witness, in and of themselves, are sufficient to sustain their position that the answer would tend to incriminate her.

Insofar as the offer of proof is concerned, it does not seem to me that any of it would be material if it were proved. It is therefore rejected.

I understand that the witness has declined to make any statement to the court, or the judge of the court, out of the presense of either the grand jury or the United States Attorney or the Assistant Attorney-General in explanation of her position. That being the case, it appears to me that the matter is now in the posture for a ruling.

It is the holding of the court that the questions do not tend to incriminate the witness and that the questions do not require an answer which would tend to incriminate the witness. It is therefore the order of the court that the witness return forthwith

to the grand jury room and answer the four questions—will you read them, please, again?

The Witness: Do you know the names of the county officers of the Los Angeles County Communist Party?

The Court: Will you stand up, please?

(Mrs. Noble stood as requested.)

The Court: Very well.

The Witness: Do you know the table of organization of [106] the Los Angeles County Communist Party?

Do you know Mr. Ned Sparks?

Do you know Mr. Vincent Russo?

The Court: Do you understand the order of the court?

Mrs. Noble: Yes, I understand.

The Court: Very well, that will be the order of the court.

Do you wish now to proceed to return to the grand jury room with this witness, or to hear the testimony on the other witnesses?

Mr. Goldschein: I think it would be well to complete all the other 10 witnesses, or nine witnesses, so that we can proceed with them all when the grand jury convenes.

The Court: I have two jury cases to try tomorrow morning at 10:00 o'clock.

Mr. Goldschein: May I suggest that the others shouldn't take any length of time because the questions are the same and the legal problems are the same and probably won't require very much more

legal argument. That is a thought that occurred to me. I, of course, offer that as a suggestion with reference to time.

The Court: What is your suggestion, that we proceed now or that the court have a recess in order to let the grand jury—I suppose that they want to telephone their homes and wives and husbands, and tell them they can or cannot [107] be home for dinner—and return here and complete the testimony this evening? I do not see how you can go ahead with it tomorrow morning. I have juries coming in to try cases and there are no other judges to try them.

Mr. Goldschein: May I suggest that the jury might be recessed until tomorrow while we continue this evening?

The Court: I think we can probably conclude this in maybe another hour or so because counsel, unless there is some other legal point that comes up, I do not suppose counsel will want to repeat all of the things that have been said, except to incorporate them.

Mr. Margolis: We really have not on any one point completed our argument. We did not have the opportunity to reply to that last case by Mr. Goldschein.

The Court: You had an opportunity to read it because in the Weisman case it is referred to.

Mr. Margolis: That is right, and sharply distinguished.

The Court: And I think counsel could just as

well have presented that case in their presentation.

The question now is, how do you wish to proceed in order to suit the convenience principally of the grand jury?

Mr. Goldschein: I just learned, may it please the court, that the grand jury is willing to stay as long as it is necessary tonight to conclude.

The Court: Now or to go out and return? [108]

Mr. Carter: They prefer to complete it this evening rather than come back tomorrow on this matter.

The Court: Do you want to recess now and come back, say, at 7:00 o'clock and proceed at that time?

Foreman Ahlswede: Your Honor, we as a group prefer to complete it this evening.

The Court: Why not consult among yourselves?

Foreman Ahlswede: We have, and we would rather complete the investigation this afternoon rather than tomorrow, if possible.

The Court: The point is now, whether or not we should recess until 7:00 o'clock and return here at that time and begin, or continue.

Foreman Ahlswede: Yes, we would prefer to recess to 7:00 o'clock.

The Court: Very well. That will be the order of the court.

The grand jury will return, and all of the witnesses who are here and subpoenaed will return, to this court room at the hour of 7:00 o'clock.

(Whereupon, at 5:30 o'clock p.m., a recess was taken until 7:00 o'clock p.m. of the same date.) [109]

Los Angeles, California,
October 25, 1948, 7:00 o'clock p.m.

The Court: Are we ready to proceed in connection with the matter which was adjourned?

Have you called the roll of the grand jury?

The Clerk: No, I haven't. I do not have the book with me.

The Court: Will you get it?

The Clerk: Yes, your Honor.

Mr. Margolis: Might I take up a matter while we are waiting?

The Court: No, I think we had better see who is here first.

The Clerk: I have it now, your Honor.

(Roll call of the grand jury by the Clerk.)

The Clerk: A quorum is present, your Honor.

The Court: Very well.

Are the witnesses here? Mr. Bissey?

Mr. Bissey: Present.

The Court: Mr. Dobbs?

Mr. Dobbs: Present.

The Court: Mrs. Smith?

Mrs. Smith: Present.

The Court: Mrs. Sherman?

Mrs. Sherman: Present. [112]

The Court: Mr. Bock?

Mr. Bock: Present.

The Court: Mr. Kasinowitz?

Mr. Kasinowitz: Present.

The Court: Mrs. Forest?

Mrs. Forest: Present.

The Court: Mr. Alexander?

Mr. Alexander: Present.

The Court: And Mr. Steinberg?

Mr. Steinberg: Present.

The Court: Very well. Mr. Margolis?

Mr. Margolis: Your Honor please, at this time I would ask leave to reopen the case on two minor matters.

I would like to say to your Honor in explanation why we are doing this. We had frankly been doing our research on some of these questions on the fly and we had a very quick dinner and looked at some cases and we feel, in order to complete the record, there are probably some minor matters that should be taken up. Ordinarily I concede that counsel should be better prepared and should have done the research in advance. I think, however, that this is an unusual situation from the standpoint of time.

The Court: What are your points?

Mr. Margolis: One matter, we would like to have the respondent herself testify before your Honor alone. That is, in [113] the absence of counsel for the prosecution.

The Court: And the grand jury?

Mr. Margolis: And the grand jury, that is right. We would like to present the witness to your Honor.

The second is that we would like to call probably Mr. Carter to establish that the question concerning whether or not the respondent knew this Mr. Sparks who was referred to was asked because the government believed that it has information, or had infor-

mation, indicating that Mr. Sparks is a prominent official of the Communist Party.

The Court: The latter point is immaterial and beyond the purview of the court in reviewing a contempt matter. As to its materiality, under the Blair case, as indicated, it is a general inquisition, and under more recent cases the same power in the grand jury has been confirmed.

As to your first point, I understood that the witness heretofore had declined to make any statement to the court out of the presence of the grand jury and out of the presence of the prosecution, or the United States Attorney or Assistant Attorneys General, or attorneys for the government as they are referred to now in the new rules; and that she now wishes to make such a statement?

Mr. Margolis: Yes. This was upon our advice. We have been acting as her counsel and we advised her to that effect.

As I say, your Honor, we have since done some additional [114] research and are now convinced that that advice was not the best possible advice under the circumstances, and for that reason we ask leave to reopen the matter and advise her to the contrary, and she is willing to accept our advice. That is, we advised her to the contrary of what we advised her before.

The Court: You understand that that information will be presented to the court in the presence of the Clerk and the court reporter, but out of the presence of her own counsel?

Mr. Margolis: I didn't understand that. And not subject to cross-examination?

The Court: She may make any statement that she desires to me.

Mr. Margolis: And, as I understand it, there is no examination on that statement?

The Court: No examination.

Mr. Margolis: Yes, we desire to have that done, your Honor.

The Court: Very well.

Is there any objection to that on the part of the United States Attorney?

Mr. Goldscheim: No, sir. If she will make her statement to the court and satisfy the court, the government is satisfied.

The Court: Is it your desire to make such a statement, [115] Mrs. Noble.

Mrs. Noble: It is, your Honor.

Mr. Margolis: Before we go on to that, your Honor, I wonder if it may be considered that we offered to prove before the case was closed the other matter which I referred to? It isn't the fact that the case was closed that is preventing us from establishing the other matter, but rather your Honor's ruling that it is immaterial.

The Court: Concerning the testimony that you expect to elicit from Mr. Carter?

Mr. Margolis: Yes.

The Court: Yes. It is immaterial.

If the witness desires to make such a statement to the court in the presence only of the court re-

porter and the Clerk and out of the presence of the attorneys for the government and her own counsel and the grand jury, I will recess to chambers with the reporter and the Clerk and the witness.

(Here followed statement by the witness Noble to the court in chambers, reported but not transcribed.)

The Court: Will it be necessary to again call the roll of the grand jury, or will counsel stipulate that the grand jury is present, the same members who were here before?

Mr. Margolis: So stipulated.

Mr. Goldschein: So stipulated.

The Court: Very well. [116]

The witness has made a statement to the judge in chambers and the court finds that the explanation given by the witness is not sufficient in law or in fact to excuse her from answering the questions, and the order will stand, that the witness is ordered and directed to answer the questions propounded by the attorney for the government in the presence of the grand jury and to the grand jury.

Mr. Goldschein: May we request of the court to determine at this time whether or not the witness will answer the questions before the grand jury in order to save the time of the court and the time of the grand jury? We have nine other cases tonight and it won't take but possibly a minute to find out whether or not the witness will obey the order of the court.

The Court: No, I think that that would probably

be improper in the procedure. The witness is ordered to answer the questions. The grand jury will resume, the questions may be propounded to the witness, and she may then have an opportunity, in the atmosphere of the grand jury and the time which may elapse between now and then, for her to give consideration as to whether or not she will or will not answer the questions. I will not put her under the compulsion at this moment of making the determination of whether she will or will not answer. She has the right to make that determination at the time she is asked the questions in the presence [117] of the grand jury.

You will proceed with your next matter.

Mr. Goldschein: The next case——

The Court: This is not a case.

Mr. Goldschein: I am sorry. The next matter is Mr. Wesley Bissey.

E. L. DRUMMOND

resumed the stand and testified further as follows:

Direct Examination (continued)

By Mr. Goldschein:

Q. Mr. Drummond, the next witness in order is Wesley Bissey. A. Yes, sir.

Q. Will you tell the court whether or not Mr. Wesley Bissey was sworn in the grand jury room?

A. He was sworn to tell the truth.

The Court: When?

The Witness: This afternoon. I haven't the time.

By Mr. Goldschein:

Q. This is an examination of Mr. Bissey that took place this afternoon in the grand jury room, is it not? A. Yes, sir.

Q. And the witness was at that time sworn?

A. Yes, sir.

Q. Now will you read the questions propounded to him [118] and the answers that he gave.

A. "Q. By Mr. Goldschein: Your name is Wesley Alexander Bissey?

"A. Wesley Bissey.

"Q. Is the middle name Alexander?

"A. No, sir.

"Q. Are you ever known by that?

"A. No, sir.

"Q. Are you known by any other name?

"A. No, sir.

"Q. That is the only name you ever have been known by? "A. Yes.

"Q. Mr. Bissey, so that you will understand your position here before this grand jury, the grand jury is not investigating you. You are merely subpoenaed to act as a witness and give what evidence you may have. Do you understand? "A. Yes.

"Q. Now in connection with that the grand jury wants to know whether or not you will give us—wants to know this: Do you know the names of the county officers of the Los Angeles County Communist Party?

"A. I must refuse to answer this question, sir, on the ground that it may tend to incriminate me.

“Q. Do you know what the word incriminate means, sir?

“A. I would not attempt to give a legal definition of the word.

“Q. Do you know that it means that if you answer that question it may involve you in a Federal crime? That is what you are saying. Do you understand that? Do you understand what I mean?

“A. I think I understand what you mean.

“Q. To elaborate, when you say you refuse to answer on the ground that the answer may incriminate you, you say in substance that to answer my question may involve you in the commission of a crime against the United States government. Now, you haven't committed any crime against the United States government, have you?

“A. I would have to consult with my attorney before I could answer that.

“Q. You mean you would have to consult with your attorney to determine whether or not you have committed a crime against the United States government?

“A. As far as I know I have committed no crime against the United States government. [120]

“Q. Then why do you hesitate to answer my question?

“A. On the ground that my answer may incriminate me.

“Q. Do you know the table of organization of the Los Angeles County Communist Party?

“A. I must refuse to answer this question, sir, on the same grounds.

“Q. What is your occupation, sir?

“A. A steamfitter.

“Q. Where are you employed?

“A. I am not employed right now.

“Q. Do you know Mr. Ned Sparks?

“A. I refuse to answer this question on the ground that it may incriminate me also.

“Q. Do you know Mr. Vincent Russo?

“A. I refuse to answer this question, for the same reason.

“Mr. Goldschein: All right, sir. You are excused. Will you wait in that same room that you were in a few minutes ago?

“The witness: I will, sir.”

Mr. Goldschein: Now, may it please your Honor, we insist that the witness has no legitimate claim against self-incrimination. We ask the court to hear the witness as it did [121] the witness before to determine whether or not there is any danger, present danger, of the witness becoming involved in a Federal crime, whether his answers would tend to incriminate him.

The Court: Mr. Margolis, I take it you wish to make the same record in connection with this matter as you did in the other?

Mr. Margolis: Yes, I wish to make the same record.

I wish, however, in this case to include as part of that record the matters which were included after the recess and reopened as being part of the original record.

The Court: In order to save repetition—let us

see—your first request is for a motion for a continuance?

Mr. Margolis: That is right, your Honor.

The Court: On all of the grounds which you have heretofore urged. Any additional grounds on the continuance?

Mr. Margolis: Those that have been stated.

The Court: Very well. That is denied.

Your second position is that on the merits the witness is justified in refusing to answer the question on the ground that it might incriminate him?

Mr. Margolis: Yes. I have made certain offers of proof in connection with that, and I offered certain exhibits, and I would like to have those included.

The Court: The same exhibits will be introduced here. [122]

Mr. Margolis: And they will be considered as part of the record in this case?

The Court: And the same offers of proof will be deemed to have been made and stated as before.

Mr. Margolis: The exhibits together with the stipulations that counsel made with respect to the exhibits?

The Court: It will be so ordered, as if they had been now repeated. And in addition to the grounds which you theretofore urged you now wish to urge an additional ground on the merits?

Mr. Margolis: I wish that all of my offers of proof that remain in the other case be deemed to have been made in this case.

The Court: Pardon me. Does the witness wish to make a statement to the court?

Mr. Margolis: Yes, your Honor.

The Court: Very well. Does he wish to make that now or after you have made your statement?

Mr. Margolis: I would like first of all to have an opportunity to supplement the argument. I want to rely upon the argument that was made in the Noble case but in addition to supplement that argument in this case.

The Court: It may be deemed that all of the matters and things which you urged in opposition to the motion of the attorneys for the government in the Noble matter will have been [123] made and stated by you in this matter with the same force and effect as if here repeated.

Mr. Margolis: All right.

The Court: You will therefore confine your statement to any supplemental matter. [124]

* * * *

Mr. Margolis: * * * *

In other words, unless it appears crystal clear to this court in the light of the circumstances shown, when there were no showing of circumstances in the Mason case, but in the light of the circumstances shown here, that the answer can be given with entire impunity, then there is a complete right to claim the Fifth Amendment.

And then what does the court do?

The Court: No answer of any witness in any inquiry can be given with entire impunity. Suppose they got somebody before a grand jury and said, "What is your name?" Well, they could refuse to answer that.

"Are you a citizen of the United States?" They could refuse to answer that because some day sometime there may be some immigration proceeding pending, or deportation proceeding pending against him, or some selective service matter, or some forgery of some government check or something else.

Mr. Margolis: Your Honor of course is right. You have to show some possibility. [127]

* * * *

The Court: Counsel, I still do not know what crime they [129] could show they have committed if they would answer these questions.

Mr. Margolis: The point is, your Honor, that it might be a link in the crime which the government says it is, to knowingly belong to the Communist Party. It might be a link in establishing that. The thing that was lacking in the Mason case was that nobody showed, or attempted to show, that the government claimed that that was an illegal card game. For all that appeared, from all of the evidence, the possibility that anyone would ever claim that that was an illegal card game was simply somebody's speculation.

Now, as your Honor says, where it is mere speculation then the defendant cannot rely upon it. But we are not relying on speculation. We say that this is a possible chain in the link of evidence which the government itself has said is a basis for an indictment, and if it is a basis for an indictment, whether or not there could be a valid conviction, whether or not the conviction will eventually be sustained by the Supreme Court, is immaterial. We would argue

that it could not be. But the very fact that there is a possibility of indictment is sufficient reason for the right to claim the privilege. [130]

Then we have the case of *United States v. Zwillman*, which is a Second Circuit case, again decided after both these cases, decided January 15, 1940, in 108 F. (2d) 802.

In that case, here is what they say—incidentally, in that case certiorari was denied by the Supreme Court at 310 U. S. 636.

I suggest that your Honor start to read near the top of page 803 and read that page and the next one.

(The volume referred to was passed to the court.)

The Court: In this case the court points out:

“In the course of argument at the time of the presentment defendant’s counsel stated that his client had been in the liquor business up to 1933 when the 18th Amendment was repealed. In view of that statement and the apparent assumption of all concerned, proof of who were defendant’s associates in business might tend to establish a conspiracy to violate the revenue laws by failing to pay taxes, to affix stamps or to make returns under the applicable statutes.”

Then they go on to state generally that that was practically a showing that the defendant had committed an offense, and therefore his refusal to indicate who his associates were in business, that is to say, in the liquor business, during the period when it was unlawful, might tend to incriminate him, and particularly in view of the court pointing out that

there was a previous witness in a trial which had linked him with an illegal situation.

I do not see any analogy between that situation and what we have here.

Mr. Margolis: Just a comment on that, and I have one more case and then I will be finished.

Certainly it would be a novel contention that in order to claim the privilege against self-incrimination one would have to come into court and prove that he was guilty of the crime. [132]

The Court: In this case there was no showing at all on the part of the United States Attorney, or the attorney for the government, as they are now called, that it was not the purpose of the inquisition of the grand jury to seek a prosecution against the witness. In this particular case that has been specifically disclaimed.

Mr. Margolis: But we have made a showing——

The Court: So that I doubt if any prosecution against any of these witnesses who are appearing before the grand jury at this time, based upon their testimony, but what they would not have immunity. It seems to me it almost amounts to immunity on the part of the government.

Mr. Margolis: I don't believe the United States Attorney and the statute can grant immunity.

The Court: You do not? They certainly have, and it has been held many times.

Mr. Margolis: I understand that that has to be approved by the court.

The Court: Immunity is an act which may occur without anybody consciously doing it. And here the attorney for the government has specifically stated

to the witness that this is not for the purpose of prosecuting you in connection with any crime whatsoever.

Mr. Margolis: But they have not said that this evidence will not be used against you for any purpose whatsoever, and [133] we have shown, your Honor, that the Attorney General contemplates instituting other proceedings in which evidence like this would be material. The mere fact that the guarantee doesn't—

The Court: I am not holding that it is immunity. Maybe I will have to pass on that later on. But it seems to me as though the United States Attorney would certainly be precluded from bringing any prosecution against the witness for their statement which they might make in connection with such an investigation and interrogation.

Mr. Margolis: The very fact that your Honor indicates doubt indicates that the witness, if he believes he might be incriminated, is not in the position where he can safely answer.

The Court: The reason that I indicate doubt is the judicial forehandedness which might require me to rule upon the argument which some lawyer might convince me otherwise on some day.

Mr. Margolis: Yes, your Honor, and the witness has to worry about your Honor being convinced otherwise, too. It is the witness who is being placed in jeopardy and it is the witness who has an even greater privilege in that regard.

While on that point, your Honor, on that case, certainly the defendant, as a condition of claiming

his privilege, isn't required to come in and say, "Look, I am guilty of this offense," [134] or "I think I am guilty," or even give evidence indicating that he thinks he is guilty, in order to establish the immunity.

The Court: No, but the respondent has to show that there is some likelihood of him incriminating himself.

Mr. Margolis: That is right. And that is precisely why we fall within that case.

The Court: In the Weisman case they came in and showed the indictment and the connection and the possibility that the answer might connect him with some other criminal case.

Very well. Let us proceed with your next point, counsel.

Mr. Margolis: I have one more case, your Honor.

The Court: All right.

Mr. Margolis: That is the case of United States v. Cusson, 132 F. (2d) 413, another Second Circuit Court case, and there the court said: [135]

* * * *

I say here, whether you know somebody who was a member of the Communist Party, or whether you know the Communist Party organization chart, that that is a warm enough scent in view of the position of the government that membership in the Communist Party is a crime under the Smith Act, that that is a warm enough scent so that a person, just like this person here, doesn't say whether she knew the Groveses, whether she had talked to them, so here a

person doesn't have to say whether he knows anything about the Communist Party.

The Court: I do not know if the Smith Act says it is a crime to be a member of the Communist Party; it says it is a crime to advocate the overthrow of the government of the United States by force and violence.

Does it say that it is a crime to be a member of the Communist Party?

Mr. Margolis: No, it doesn't, but the point is here that the government has taken that position.

* * * *

The Court: Let me see, Mr. Margolis. You have offered in evidence and there is in evidence in connection with this immediate matter the indictment in New York against Foster and the indictment against the other man and the stipulation that there were 10 or 12, whatever there were, identical indictments against the other named defendants in the one indictment in which Foster is the principal defendant.

In this case it states:

"At the time of her visit (that is to Philadelphia), two men named Groves were under indictment in the Southern District of New York; the nature of the charge does not appear. Their trial took place a little while afterwards; she went to Mexico before it began, stayed there while it was on, and came back shortly after its conclusion. Her excuse for refusing to say whether she met and talked with 'the Groveses' was that it might serve as a link in establishing that they had told her to go to Mexico so as to avoid being

called as a witness upon their trial and that this would tend to prove that she had conspired with them to obstruct justice.”

Where is the analogy between this witness and the indictment against Foster? Is there anything in this record which you are offering or have offered which will tend to show that this witness has talked with William Z. Foster, or is part of the same crime which is charged against William Z. Foster and the others, or any of them?

Mr. Margolis: They don't say here that she talked with the Groveses, she refused to say whether she talked with the Groveses.

The Court: She refused to say that before the grand jury, but she offered that obviously before the court.

Mr. Margolis: No. Her excuse for refusing to say whether [140] she met and talked with the Groveses was that it might serve as a link. She didn't say that before the court. She said, “I don't want to tell you that I met and talked with them because if I did it might serve as a link.” Now that is precisely what the witness is saying here, “I don't want to say whether I know Mr. Sparks, whether I know what the chart of organization is, because it might serve as a link.”

The Court: Very well. Let us say that you are correct. The witness' statement here that he does or does not know—I do not know what his answer is going to be.

Mr. Margolis: They didn't know in that case either.

The Court: In considering this question the court cannot contemplate that the answer will be yes or no. I do not know what the answer is going to be.

Mr. Margolis: They couldn't tell in that case either.

The Court: So as to say, in effect, that however he answers this question it will connect him with the William Z. Foster case.

Mr. Margolis: No, your Honor. She could have said "No" to the Groveses' question, she could have said "No" there. The court didn't take that into consideration. You don't have to prove that your answer would be a "Yes" answer which would actually incriminate you. All you need to show is that it might tend to, your Honor. Otherwise the condition of claiming the privilege is proving that you are guilty.

The Court: That it might tend to connect her.

Mr. Margolis: That is right. That is sufficient. There is nothing in there which indicated that the court knew that she was going to say she knew the Groveses.

The Court: Very well. Your next point?

Mr. Margolis: That is all I have, your Honor.

The Court: That is all you have to offer in supplement?

Mr. Margolis: Yes.

The Court: Mr. Goldschein, do you have anything more?

Mr. Goldschein: I think the court understands the government's position. I think it would be just taking up the time of the court.

The Court: Very well. It will be the same order

in connection with this witness as with the witness Noble.

Mr. Margolis: I do have one other point. I will make it very brief.

In this case, your Honor, we are dealing with a right, the right of freedom of association, which is protected by the First Amendment, and it is our contention that in a case such as this, where there is an inquiry into the right of freedom of association, as protected by the First Amendment, that at the very least there must be a showing on the part of the government which would justify an invasion into the area of opinion and belief; that if the government says that there is nothing whatsoever incriminating about this, then they are [142] invading the area of belief and association protected by the First Amendment.

The Court: This person is not being accused before the grand jury. The government has a right to inquire and the grand jury has a right to inquire. The grand jury may determine after hearing the testimony that it is a matter of belief or association.

Mr. Margolis: There was a time, your Honor, when the Star Chamber of England said that it had a right to inquire of a man, what is your religion, but that time is no longer, and it was the intention of the First Amendment to preclude inquiries into a man's religious beliefs, into his political beliefs and political associations, and at the very least to require on the part of the government, where an inquiry into that area was being made, to

show some justification therefor. There is no presumption of the validity of an inquiry into that area.

That is the point we want to make.

The Court: I understand.

Mr. Margolis: Before your Honor closes on this matter I want to remind your Honor that the witness in this case has a statement to make that has not yet been done in this matter.

The Court: Yes. Does he desire to make the statement in open court?

Mr. Margolis: No, your Honor. To your Honor.

The Court: He desires to make it privately?

Mr. Margolis: Yes, sir.

The Court: As before?

Mr. Margolis: Yes, your Honor.

The Court: Out of the presence of everyone except the court attaches?

Mr. Margolis: Yes, sir.

The Court: Very well. The court will adjourn to chambers. The witness Bissey will come into chambers, together with the court reporter, the Clerk and the bailiff.

(Here followed statement by the witness Bissey to the court in chambers, reported but not transcribed.)

The Court: Is there a stipulation made that the

grand jury is present and that the Clerk need not call the roll?

Mr. Margolis: Yes, your Honor.

Mr. Goldschein: Yes, your Honor.

The Court: The statement made by the witness in chambers privately to the judge adds nothing to what has heretofore been stated in open court by counsel, and is not exculpatory of his refusal to answer the question, nor in justification. For that reason the order will stand.

Mr. Bissey, it is the order of the court that you appear forthwith before the grand jury upon their immediate reconvening into session and answer the questions which were put to you and which you refused to answer on the ground that you might incriminate yourself and which were—will you read [144] them, Mr. Reporter? There are four questions. There is one that you were justified in not answering.

The Witness: Do you know the names of the county officers of the Los Angeles County Communist Party?

The Court: That is question No. 1.

The Witness: Do you know the table of organization of the Los Angeles County Communist Party?

The Witness: Do you know Mr. Ned Sparks?

The Court: That is No. 2.

The Court: No. 3.

The Witness: Do you know Mr. Vincent Russo?

The Court: No. 4.

Do you understand the order of the court, Mr. Bissey?

Mr. Bissey: Sir?

The Court: Do you understand the order of the court?

Mr. Bissey: I understand it is the order of the court to answer those four questions.

The Court: It is the order of the court that you answer those four questions. You will remain in attendance and forthwith appear before the grand jury upon their reconvening, and upon the questions being asked of you that you answer them.

All of the grounds of the objection thereto are overruled.

You will proceed with the next witness. [145]

By Mr. Goldschein:

Q. Mr. Drummond, were you in the grand jury room when the witness Ben Dobbs was called in to testify? A. I was.

Q. Was he placed under oath? A. He was.

Q. Did you take down his testimony?

A. I did.

Q. As to the questions asked and the answers he gave? A. I did.

Q. Will you read the questions asked him and the answers he gave, please, sir?

A. "Q. By Mr. Goldscheine: Your name is Ben Dobbs, is it, sir? "A. That is right.

"Q. Where do you live?

"A. 2737 Malabar Street, Los Angeles.

"Q. Are you known by any other name?

"A. By some people.

"Q. What other name are you known by?

"A. Benjamin Isgar. I was born with that name.

"Q. Mr. Dobbs, let me explain your position here to you. The grand jury is not investigating you. You are merely subpoenaed here as a witness [146] to give such evidence as you may have. Do you understand your situation?

"A. Yes, I understand what you said.

"Q. Now, do you know the names of the county officers of the Los Angeles County Communist Party?

"A. I refuse to answer that question on the ground that the answer will incriminate me.

"Q. Do you know what the word incriminate means, sir?

"A. I have some idea of what the word means, but I take it as my privilege to give that answer I just gave, including the word incriminate.

"Q. Regardless of what the word means, you

don't mean that you have a right to determine whether or not you will answer or not, do you?

"A. I refuse to answer that question on the ground it might incriminate me, the one you just asked, regardless of whether I have a full understanding of the meaning of the word incriminate.

"Q. I see. All right. All right here, sir.

"Do you know the table of organization of the Los Angeles County Communist Party?

"A. I refuse to answer that question on the same grounds.

"Q. What is your occupation, sir? [147]

"A. I am an organizer.

"Q. For what organization?

"A. I also refuse to answer that question on the ground that it may incriminate me.

"Q. Do you know Mr. Ned Sparks?

"A. I refuse to answer that question on the same grounds.

"Q. Do you know Mr. Vincent Russo?

"A. I refuse to answer that question on the same grounds, it may incriminate me.

"Mr. Goldschein: Will you wait on the grand jury in that room, please?"

Mr. Goldschein: We insist also, may it please the court, as to this witness that he has no privilege against self-incrimination on the questions asked of him, and ask the same procedure be followed.

The Court: There are five questions here. There were six questions he refused to answer. One of them was not very clear. One of them, he said he

had no understanding of the word "incriminate." I do not think he need answer that because he answered it.

Mr. Margolis, I take it that you wish to make the same motion for a continuance as before?

Mr. Margolis: Yes. We might shorten it, your Honor, by this stipulation, that the record in all respects—— [148]

The Court: Without committing you to a stipulation, perhaps I can straighten it out by an order so that neither side need prejudice their position in the record by a stipulation.

Mr. Margolis: Very well.

The Court: The order will be that it will be deemed that the motion to continue was made on all the grounds and for all the reasons stated by you heretofore in connection with the Noble case. That motion for a continuance will be denied.

It will be deemed that all of the objections heretofore urged in connection with both the Noble case and the Bissey case have been made by you and for all of the reasons and on all of the grounds assigned to each of them in objection on the merits to these questions.

Mr. Margolis: I think that should also include that it will be deemed that the evidence received——

The Court: And the evidence received.

Mr. Margolis: ——together with the stipulations will be deemed received in this case.

The Court: That is correct, as well as the offers of proof.

Mr. Margolis: That is right.

The Court: The offers of proof will be rejected and the objections will be overruled and denied.

Does this witness desire to make a statement to the court?

Mr. Margolis: Yes, your Honor.

In addition to the argument that has previously been made, there is one question here which is somewhat different, if your Honor please, than any of the other questions.

The Court: You mean, what is your occupation?

Mr. Margolis: No, your Honor. The question, what is your occupation, was answered. That was answered by saying organizer. The question—I don't remember the exact wording—but it was, organizer for what organization. I believe that is a correct statement of the record, your Honor.

The Court: For what organization?

The Witness: Yes, sir.

The Court: He said, "I am an organizer," and he declined to answer the question, "for what organization?"

Mr. Margolis: Yes, your Honor.

It seems to me that there we are getting directly into the question of being an officer with the possibility that this sort of an answer might incriminate him on the ground that it might tend to establish that this individual is an officer of an organization which the United States Attorney has contended advocates the overthrow of the American

form of government by force and violence, and upon the basis of which he has obtained other indictments against other officers and [150] has said that he would obtain similar indictments in Los Angeles and elsewhere.

The Court: It is not your contention, again may I ask, that the answer to that would indicate that he is a member of an organization which advocates the overthrow of the government by force and violence?

Mr. Margolis: The answer to it might indicate that he is an officer of an organization which the government contends, which the United States Attorney General has declared, advocates this, and upon the basis of which he might be indicted by the United States Attorney.

I am certainly not prepared to concede that the organization advocates that. As I say, I stand on the Schneiderman case.

The Court: I just wanted the record straight.

Mr. Margolis: We think that while the other questions are sufficiently direct to raise the issue, that here you get really right down to the heart of the thing, and if he can be required to answer this question then Mr. Foster could have been called before the United States grand jury and if he were asked, "What is your occupation?" and he said, "I am an organizer," and he was asked, "For what organization?" then he would have been compelled to answer even though there is an indictment against him because of his being an officer of that organization. [151]

Mr. Goldschein: May it please the court, the government denies that there is any contention here that the Communist Party is an illegal organization or that they, as a party, advocate the overthrow of the government by force and violence. There is nothing that has been said in this courtroom, or by anyone else for the government, with reference to the statement that Mr. Margolis continuously has made in this case, and I would like to straighten him out now.

Mr. Margolis: If your Honor please, we have offered to prove that this is the government's position, and certainly counsel for the government cannot simply, by getting up and making a denial, deprive us of the offer to prove. We are prepared, if given an opportunity, to establish that that is the position of the government.

The Court: I have ruled on the subject. It is not a question of counsel understanding each other, it is a question of me understanding each of counsel, and I think I understand the position of the government and the position of counsel here who have advocated their cause.

Mr. Margolis: Mr. Dobbs wishes to make a statement.

The Court: Mr. Dobbs, are you here?

Mr. Dobbs: Yes, sir.

The Court: Will you stand up, please, so I can see you.

(Mr. Dobbs stood as requested.)

Do you desire to make a statement to the court?

Mr. Dobbs: I do, sir.

The Court: Under the same conditions as I indicated heretofore to the other witnesses?

Mr. Dobbs: Yes, sir.

The Court: Very well. We will retire to chambers with the bailiff, reporter and the Clerk.

The Court: Is it stipulated that the grand jury is present as before?

Mr. Margolis: Yes, your Honor.

The Court: The witness Dobbs has made a statement to the court privately in chambers. Nothing has been added to that which has already been urged by counsel and nothing has been said in exculpation of his refusal to answer the question, nor in justification.

For that reason, Mr. Dobbs, the order of the court will be that you are now ordered and directed to answer the five questions, namely——

The Witness: Now, do you know the names of the County Officers of the Los Angeles County Communist Party?

The Court: No. 1.

The Witness: Do you know the table of organization of the Los Angeles County Communist Party?

The Court: No. 2.

The Witness: For what organization? [153]

The Court: No. 3.

The Witness: Do you know Mr. Ned Sparks?

The Court: No. 4.

The Witness: Do you know Mr. Vincent Russo?

The Court: No. 5.

You are ordered to answer those questions and report forthwith to the grand jury immediately upon their reconvening and respond to them.

Do you understand the order, Mr. Dobbs?

Mr. Dobbs: Yes, sir.

The Court: Very well.

Mr. Goldschein: The next witness is Delphine Murphy Smith.

The Court: Mrs. Smith?

Mrs. Smith: I am present.

The Court: Very well.

Q. (By Mr. Goldschein): Now, Mr. Drummond, were you in the grand jury room when Mrs. Delphine Murphy Smith appeared as a witness?

A. I was.

Q. Was she sworn? A. She was.

Q. Did you take down the questions propounded to her and the answers she made?

A. I did. [154]

Q. Will you read the questions asked and the answers made, please, sir.

A. "Q. (By Mr. Goldschein): Your name is Delphine Murphy Smith? Is that Miss or Mrs.?

"A. Mrs.

"Q. Mrs. Delphine Murphy Smith?

"A. Right.

"Q. Where do you live?

"A. 1410 Amapola, Torrance.

"Q. I want you to know that this grand jury is not investigating you, that you are merely subpoenaed here as a witness to testify to such facts

as you may have any knowledge of. Do you understand your position? A. Yes, I do.

“Q. Now, Mrs. Smith, do you know the names of the county officers of the Los Angeles County Communist Party?

“A. I refuse to answer on the ground it may incriminate me.

“Q. May what?

“A. Intimidate is not the word. Incriminate I believe is the word I wanted to use.

“Q. You are not familiar with the term incriminate, are you? [155]

“A. Not too familiar with it, no.

“Q. I will explain it for you. The term in connection with the business of this grand jury simply means this: that if the answer to the question I just asked you would involve you in the commission of a crime against the United States Government, you can then claim your privilege against self-incrimination. In other words, you are not compelled to give any facts which may tend to involve you in a Federal crime. Now, if the answer to the question will not involve you in the commission of a crime against the United States government, then you must answer that question. Do you understand?

“A. I understand you.

“Q. All right. Now, will you answer my question?

“A. I still refuse to answer on the same grounds.

“Q. All right. Do you know the table of or-

ganization of the Los Angeles County Communist Party?

“A. I refuse to answer on the ground that it may incriminate me.

“Q. Do you know Mr. Ned Sparks?

“A. I refuse to answer on the ground that it may incriminate me.

“Q. What is your business, please, Madam?

“A. I am a housewife.

“Q. What does your husband do?

“A. I refuse to answer on the ground that it may incriminate me.

“Q. You really don't believe that, do you?

“A. I refuse to answer on the grounds it may incriminate me.

“Q. But you really don't believe it would incriminate you, do you?

“A. I am sorry. I refuse to answer on the ground it may incriminate me.

“Mr. Goldschein: All right, Madam. We will recess you. You are not excused. Will you wait in that room that you just came from?

“The Witness: Of course.”

Mr. Goldschein: We insist, may it please the court, that none of the questions asked the witness would tend to incriminate her for the violation of any Federal offense, and insist the witness be compelled to answer.

The Court: Mr. Margolis, without repeating all of the grounds or without committing you to a stipulation, it may be deemed that the motion for a continuance has been made in this case as in

the other cases, and for the same grounds and all the reasons given. The order of the court is that the motion for a continuance is denied. [157]

It may be deemed also for the purpose of the record that on the merits the objection to compelling the witness to answer the question has been made by you on her behalf on all of the grounds and for all of the reasons assigned in connection with each one of the previous witnesses; and that there has been admitted in evidence the same evidence and the same stipulations as the others, and that the same proffers of proof were made.

Mr. Margolis: Yes.

The Court: It will be the same order, except that there are two questions here which I think the witness need not answer. Does this witness desire to make a statement to the court privately?

Mr. Margolis: Yes, your Honor.

The Court: As with the other witnesses, under the same conditions?

Mr. Margolis: Yes.

The Court: Very well. The court will adjourn to chambers.

(Here followed statement by the witness Smith to the court in chambers, reported but not transcribed.)

The Court: Same stipulation concerning the grand jury?

Mr. Margolis: Yes, your Honor.

Mr. Goldschein: Yes.

The Court: The witness has made a statement to the [158] court privately in chambers which adds

nothing to the statement and reasons and objections made by her counsel, and which does not tend to exculpate her in any way for her refusal to answer the question, nor justify her refusal, nor tend to show that it would incriminate her at all.

For that reason the witness is now ordered and directed to answer the following questions—will you read them?

The Witness: Now, Mrs. Smith, do you know the names of the county officers of the Los Angeles County Communist Party?

The Court: Mrs. Smith, you are ordered and directed to answer that question.

The Witness: Do you know the table of organization of the Los Angeles County Communist Party?

The Court: You are ordered and directed to answer that question.

The Witness: Do you know Mr. Ned Sparks?

The Court: You are ordered and directed to answer that question.

The Witness: What does your husband do?

The Court: What is the next question?

The Witness: That is the last one.

The Court: There is another one; you really don't believe that, do you?

The Witness: Oh, yes. You really don't believe that, do you? [159]

The Court: She is not ordered to answer the last question, You really don't believe that, do you.

The question, What does your husband do, raises another point. Her ground for not answering that was on the ground that it might incriminate her. She is ordered and directed to answer that question.

Mrs. Smith, you are ordered and directed to answer the questions as indicated and to report immediately to the grand jury upon their reconvening and answer them.

Do you understand the order of the court, Mrs. Smith?

Mrs. Smith: Yes, I do.

The Court: Very well.

Mr. Goldschein: The next witness, may it please the court, is Mrs. Miriam Brooks Sherman.

Q. Mr. Drummond, were you in the grand jury room this afternoon when Mrs. Miriam Brooks Sherman appeared as a witness? A. I was.

Q. Was she sworn? A. She was.

Q. Did you take down the questions that were propounded to her and the answers she gave?

A. I did.

Q. Will you read those questions and answers, please?

A. "Q. (By Mr. Goldschein): Your name is Miriam [160] Brooks Sherman?

"A. Yes, sir.

"Q. Miss? A. Mrs.

"Q. Mrs. Sherman, you are not under investigation by this grand jury. You are merely subpoenaed here as a witness to testify to such facts as you may have. Do you understand your posi-

tion? A. Yes, I do.

“Q. They want to know from you whether or not you know the names of the county officers of the Los Angeles County Communist Party.

“A. I would refuse to answer that on the ground that it may incriminate me.

“Q. Do you know what the word incriminate means in connection with your statement?

“A. Well, I am not an attorney and I don't think I know the full legal definition of it, but I understand that it is my privilege to claim the right to refuse to answer that question on the ground of incrimination.

“Q. Of course, you got the advice of an attorney before coming in here with reference to your privilege and you know what your privilege is against self-incrimination, don't you? [161]

“A. Yes, I do.

“Q. And let me explain what your privilege as to self-incrimination means. If the answer that you would give to my question would tend to incriminate you, tend to make you a defendant in a Federal criminal case, it would tend to show that you violated a Federal statute—now, you haven't violated any Federal statute in connection with that question, have you?

“A. In connection with what question, sir?

“Q. Would this answer, the answer to the question I asked you, involve you in the commission of a Federal offense? And the question that I asked was this: Do you know the names of the county

officers of the Los Angeles County Communist Party?

"A. I still think that my previous answer is correct, that it may incriminate me.

"Q. All right. Let me ask you this: Do you think that the answer that you would give to that question would involve you in the commission of a Federal offense?

"A. It might incriminate me.

"Q. That is what you said before. I want to make sure we understand each other.

"A. Yes. [162]

"Q. Do you think it would involve you in the commission of a criminal offense?

"A. No, I believe it would incriminate me.

"Q. I see. Do you know Mr. Ned Sparks?

"A. I refuse to answer that question on the ground it might incriminate me.

"Q. What is your occupation?

"A. I am a musician.

"Q. Madam? A. I am a musician.

"Q. Are you employed?

"A. Yes, I am employed.

"Q. Where?

"A. I also would like to refuse to answer that, on the ground that it might incriminate me.

"Q. What instrument do you play?

"A. I play the piano.

"Q. Any other? A. No.

"Mr. Goldscheim: All right, then, we will recess you. You are not excused. Will you wait in that same room from which you just came?

“The Witness: “Yes, I will.”

Mr. Goldschein: We insist, may it please the court, that the claim of privilege against self-incrimination is not well [163] founded and ask the court to ask the witness to answer the questions.

The Court: It may be deemed on behalf of the witness that the motion for a continuance has been made on all of the grounds and for the reasons heretofore previously assigned by Mr. Margolis in connection with the other matters?

Mr. Margolis: Yes, your Honor.

The Court: The motion for a continuance is denied.

It may also be deemed that there has been offered in evidence the documents and the stipulations and the same proffers of proof made on behalf of this witness as the previous ones, and that all the grounds of objection and reasons heretofore urged in opposition to the motion of the government have been urged on behalf of this defendant as if they were again repeated?

Mr. Margolis: I think your Honor said that it would be deemed that certain evidence has been offered.

The Court: The same evidence.

Mr. Margolis: The same evidence.

The Court: And the same offers of proof.

Mr. Margolis: Yes, and the same evidence as was received in the other cases is also received in this case?

The Court: Yes. That is what I meant to say.

Mr. Margolis: Yes.

The Court: Does this witness wish to make a statement [164] to the court privately?

Mr. Margolis: Yes, sir.

The Court: The witness does?

Mr. Margolis: Yes.

The Court: Very well. We will adjourn to chambers again.

(Here followed statement by the witness Sherman to the court in chambers, reported but not transcribed.)

The Court: Same stipulation?

Mr. Margolis: Yes, your Honor.

Mr. Goldscheine: Yes.

The Court: The witness has made a statement to the court privately in chambers, which has added nothing to the grounds or legal reasons advocated on her behalf by her counsel, nor has she stated anything which would indicate an exculpation for her refusal to answer the question, nor anything at all which would indicate that the answers to the questions might tend to incriminate her. For that reason the same order will be made in this case as in the previous case, and in order that the witness may have an understanding of the order the reporter will now read—I think there were only three—the questions asked of this witness.

The Witness: Do you know the names of the county officers of the Los Angeles County Communist Party? [165]

The Court: Mrs. Sherman, I just want you to be able to hear and understand the order. That is the first question.

The Witness: Do you know Mr. Ned Sparks?

The Court: That is the second question.

The Witness: And the last one: Are you employed?

A. Yes, I am employed.

Q. Where?

The Court: That is the third question.

Mrs. Sherman, you are ordered and directed to answer the three questions which I have just indicated, and to report immediately to the grand jury and answer those questions upon them being asked of you immediately upon the reconvening of the grand jury.

Do you understand the order of the court?

Mrs. Sherman: Yes, I do, sir.

The Court: Very well.

Mr. Goldschein: The next witness, may it please the court, is Philip Bock.

Q. Mr. Drummond, were you in the grand jury room this afternoon when Mr. Philip Bock appeared as a witness?

A. I was.

Q. Was he sworn?

A. He was.

The Court: Excuse me. By the way, in connection with the last witness, there was one question asked of her, have you violated any Federal statute. She need not answer that [166] question.

Proceed.

Q. (By Mr. Goldschein): Did you take down

in shorthand the questions propounded to the witness and the answers he made? A. I did.

Q. Will you read the questions and answers, please?

A. "Q. (By Mr. Goldschein): Mr. Bock, your name is Philip Bock, is it not?

"A. Yes, sir.

"Q. Where do you live?

"A. 4213 Yosemite Way.

"Q. Los Angeles? A. Yes, sir.

"Q. Mr. Bock, I want you to know that you are not under investigation by this grand jury, that you are merely here as a witness to testify to the facts that you know. Now, do you understand that phase of it? A. Yes.

"Q. All right. Now, do you know the names of the county officers of the Los Angeles County Communist Party?

"A. I refuse to answer that question on the ground it may incriminate me.

"Q. Do you know what the word incriminate means, [167] Mr. Bock?

"A. I cannot give the legal definition, but I know what it means.

"Q. How far did you go to school?

"A. I completed one year of law school.

"Q. Do you know the table of organization of the Los Angeles County Communist Party?

"A. I refuse to answer that question on the ground that it might incriminate me.

"Q. For the violation of a Federal offense, Mr. Bock?

“A. I am not qualified to answer that question.

“Q. Now, the only incrimination you can claim is for a violation of a Federal offense. Now, let me explain that to you. If the answer you give may tend to involve you in the commission of an offense against the Federal statutes, then you may claim privilege against self-incrimination. Do you understand it now? A. Yes.

“Q. You still think that the answer to the question may involve you in the commission of a Federal offense?

“A. I refuse to answer that last question on ground that I think it might incriminate me.

“Q. In other words, involve you in the commission of a Federal offense?

“A. I have answered it to the best of my ability.

“Q. I just want to make sure that you and I understand each other and we are both talking about the same thing. Are we?

“A. I can't be sure on that. I know what is in my mind, not in yours.

“Q. Now, let's state it clearly: Do you believe that the answer to the question that you may give would tend to involve you in the commission of a Federal offense?

“A. I can't conscientiously answer that question, but I have answered it as best I could. I can't answer it along any technical lines. I don't know the laws that well on that end.

“Q. Then you don't know that it will involve

you in a criminal offense, do you? You don't know that the answer to the question would tend to involve you in the commission of a Federal crime, do you?

"A. I refuse to answer that question on the ground that it might tend to incriminate me. [169]

"Q. You mean you refuse to answer my question, the last question I asked you? My question is this: Do you believe that the answer that you will give, that the answer to that question that I asked you originally, would involve you in the commission of a Federal offense?

"A. I refuse to answer this question on the ground that it might tend to incriminate me.

"Q. All right, sir. Do you know the table of organization of the Los Angeles County Communist Party?

"A. I refuse to answer that question on the ground that it might tend to incriminate me.

"Q. What is your occupation, sir?

"A. I am an organizer.

"Q. For whom?

"A. I refuse to answer that question on the ground that it might tend to incriminate me.

"Mr. Goldschein: All right, we will recess you. You are not excused. Will you wait in that same room that you just left, please?"

Mr. Goldschein: We insist that this witness does not have any claim of privilege against self-incrimination and ask the court to instruct the witness that he must answer.

The Court: It will be deemed that the same rec-

ord is [170] made in respect to this witness as was made with the previous witnesses?

Mr. Margolis: Yes, your Honor.

The Court: The same motions?

Mr. Margolis: Same motions, same objections, same evidence.

The Court: It will be the same ruling.

Does this witness desire to make a statement to the court privately?

Mr. Margolis: Yes, your Honor.

The Court: Very well. The witness will come into chambers.

(Here followed statement by the witness Bock to the court in chambers, reported but not transcribed.)

The Court: Same stipulation, Mr. Margolis, concerning the grand jury?

Mr. Margolis: Yes, your Honor.

The Court: Very well.

The witness has made the statement to the court in private and he has said nothing in addition to that which has been urged by his counsel, and has said nothing in exculpation of his refusal to answer the question, and has said nothing which would tend to show that the answers to them might incriminate him.

For that reason the order of the court will be that he [171] will answer the three questions:

Do you know the names of the county officers of the Los Angeles County Communist Party?

Do you know the table of organization of the Los Angeles County Communist Party?

What was the next question?

The Witness: What is your occupation, sir? A. I am an organizer. Q. For whom?

The Court: You will be directed to answer the third question, for whom is he an organizer. The witness is not directed to answer the question, Do you know what incrimination means and do you believe that you will incriminate yourself, and so forth.

Mr. Bock, you understand the order of the court, do you?

Mr. Bock: Yes, sir.

The Court: The order will be that as soon as the grand jury reconvenes you will attend upon them and respond to the three questions which you have been directed to answer.

The next matter.

Mr. Goldschein: The next witness, may it please the court, is Mrs. Dorothy Baskin Forest.

Q. Mr. Drummond, were you in the grand jury room this afternoon when Mrs. Dorothy Baskin Forest appeared as a witness? A. I was. [172]

Q. Was she placed under oath?

A. She was.

Q. Did you take down the questions propounded to her and the answers she gave? A. I did.

Q. Will you please read those questions, sir?

A. "Q. (By Mr. Goldschein): You are Mrs. Dorothy Baskin Forest? A. That is right.

"Q. Mrs. Forest, this grand jury is investigating matters that do not concern you at all, other than as a witness. You are not being investigated. Do you understand? A. I do.

“Q. Now, we want certain information from you. Do you know the names of the county officers of the Los Angeles County Communist Party?

“A. I refuse to answer on the ground it may incriminate me.

“Q. Do you mean, Mrs. Forest, that the answer that you will give to that question may tend to involve you in the commission of a Federal offense?

“A. I wouldn't know the answer to that without consulting with my attorney.

“Q. Do you know what the word incriminate means? [173]

“A. I would have to consult with my attorney on the legal meaning of that word.

“Q. You say you have?

“A. No, I would have to. I would have to consult with him.

“Q. Haven't you already consulted with him?

“A. Well, I don't think that is a proper question.

“Q. You say you have not?

“A. I mean I would like to consult with my attorney before I answer that question.

“Q. Didn't you already talk about that particular question with your attorney?

“A. I did not talk about that particular question, as to the meaning of the word incriminate.

“Q. What did you talk to him about?

“A. Whatever I talked about with my attorney is something between my attorney and me, I understand.

“Q. I see. Do you want this grand jury to believe

that you have not as yet discussed that question with your attorney?

"A. I want this grand jury to believe that I refuse to answer that question until I consult with my attorney, on the ground that it might incriminate [174] me.

"Q. I see. All right. Do you know the table of organization and duties of the officers of the Los Angeles County Communist Party?

"A. I refuse to answer that question on the ground it might incriminate me.

"Mr. Goldschein: All right, Mrs. Forest, we will recess you for just a few moments. Will you wait in the anteroom, please?

"Mr. Carter: You are not excused from attendance on the grand jury."

Mr. Goldschein: We insist, may it please the court, that the witness has no claim of privilege against self-incrimination and ask the court that she be directed to answer.

The Court: It may be deemed that all of the motions made in connection with the other matters are made in connection with this matter, and all of the matters and things and evidence and stipulation and offers of proof in connection therewith may be deemed to have been made in connection with this matter, with the same force and effect as if they were now repeated.

Mr. Margolis: I am getting a little tired, your Honor, May I have that repeated?

The Court: It may be deemed that you have made the same [175] motion for a continuance on all of

the grounds and reasons you assigned in connection with the others?

Mr. Margolis: Yes.

The Court: Very well. The motion for a continuance is denied.

It may be deemed that you have made the same objections on behalf of this witness that you made in connection with the others on all the grounds, on the evidence introduced and on the offers of proof and the stipulations which were made in connection with the others?

Mr. Margolis: Yes, your Honor.

The Court: The objections will be overruled.

Does this witness desire to make a statement privately to the court?

Mr. Margolis: Yes, your Honor, but before that happens I think that there is a duty upon the court to advise counsel for the government of the great impropriety of their attempt to obtain in the grand jury room the private consultation between an attorney and client, which I am sure counsel for the government must know is a privileged communication, and this constant harassment and attempt by indirection through asking questions of what is means by "incrimination" to get an admission of the commission of a crime. I think it is highly improper, and I think it is the duty of the court to so inform counsel for the government. [176]

The witness desires to make a statement to the court.

The Court: Mrs. Forest, do you so desire?

Mrs. Forest: Yes, I do.

The Court: Very well.

Mr. Margolis: Could we have a ruling on our request?

The Court: You will shortly.

We will adjourn to chambers.

(Here followed statement by the witness Forest to the court in chambers, reported but not transcribed.)

The Court: Same stipulation?

Mr. Margolis: Yes, your Honor.

The Court: The witness, Mrs. Forest, made a statement to me privately in chambers which has added nothing to the objections heretofore made by her counsel in open court and which has indicated nothing in exculpation of her refusal to answer the question, and which has indicated nothing which would tend to incriminate her in response to the three questions—will you read them, please?

The Witness: Do you know the names of the county officers of the Los Angeles County Communist Party?

Do you know the table of organization and duties of the officers of the Los Angeles County Communist Party?

The Court: And there was a third one?

Mr. Margolis: There was a number of others, what they had said to counsel and others. [177]

The Court: Just a moment.

Are you employed? Was that it?

The Witness: That wasn't asked of her. The last question she was asked was the one on the table of organization and duties.

The Court: Very well.

The other questions asked of the witness she will not be required to answer on the ground that they might incriminate her.

Mrs. Forest, you are now ordered and directed to answer the two questions, Do you know the names of the county officers of the Los Angeles County Communist Party, Do you know the table of organization and duties of the officers of the Los Angeles County Communist Party, and to attend upon the grand jury immediately upon their reconvening and to answer those questions.

The other questions asked of the witness do not require any ruling from the court except to state that the witness is not required to answer them.

In so far as counsel's objection as to the witness' understanding of the word "incriminate," I cannot see anything objectionable to it. I do not think that the effort sought was to secure any confidential information between attorney and client; rather it was to ascertain her understanding of the word "incriminate." [178]

Mr. Margolis: She was asked about conversations between client and attorney. It is right in the record. I think perhaps your Honor didn't get it.

The Court: I am not ordering her to answer those questions.

Mr. Margolis: But there were those questions, your Honor, to which I violently object and, to complete my objection, I think counsel ought to be instructed that he has no right to ask questions like that.

The Court: I think that the inquiry was appropriate and proper. I do not think that counsel, however, should pursue a course of inquiry concerning conversations between an attorney and client.

Mrs. Forest, do you understand the order of the court?

Mrs. Forest: I understand the order.

The Court: Very well. The next matter.

Mr. Goldschein: The next witness, may it please the court, is Samuel Harry Kasinowitz.

Q. Mr. Drummond, were you in the grand jury room this afternoon when Mr. Samuel Harry Kasinowitz appeared as a witness? A. I was.

Q. Was he placed under oath? A. He was.

Q. Did you take down in shorthand the questions propounded [179] to him and the answers he gave?

A. I did.

Q. Will you please read those questions and answers, please?

A. "Q. (By Mr. Goldschein): Your full name is Samuel Harry Kasinowitz?

"A. That is right.

"Q. Where do you live, Mr. Kasinowitz?

"A. Los Angeles.

"Q. Sir? A. Los Angeles.

"Q. Your address?

"A. 4320 Lockwood Avenue.

"Mr. Kinnison: Will you speak a little louder, please?

"Q. (By Mr. Goldschein): You are not under investigation by this grand jury, Mr. Kasinowitz. You are merely here as a witness to testify to such

facts as you know. Now, do you know the names of the county officers of the Los Angeles County Communist Party?

"A. Well, I refuse to answer that question on the ground it would incriminate me.

"Q. Do you know what the term incriminate means, Mr. Kasinowitz? [180]

"A. I think I have a notion as to what it means. I don't know the exact legal definition.

"Q. Well, let's see if I can't explain it to you. If you believe that the answer you may give to the question I asked you would tend to involve you in the violation of a Federal offense, you then may claim privilege against self-incrimination. Do you believe that the answer you will give to that question would involve you in the commission of a Federal offense? A. I believe so, yes, sir.

"Q. What is your occupation, Mr. Kasinowitz?

"A. A printer.

"Q. Where are you employed?

"A. I am unemployed.

"Q. You are unemployed at present?

"A. Yes, sir.

"Q. Do you know the table of organization of the Los Angeles County Communist Party?

"A. Well, I would have to refuse to answer that question on the ground that it might incriminate me.

"Mr. Goldschein: All right, we will recess. You are not excused. We will just recess you. Wait in that room which you just left."

Mr. Goldschein: We insist, may it please the court, that [181] the witness has no proper claim to

a privilege against self-incrimination and ask the court to instruct the witness that he must answer the questions.

The Court: It may be deemed that the motion for a continuance is made in connection with this matter on the same grounds and for the same reasons as that heretofore indicated?

Mr. Margolis: Yes, your Honor.

The Court: The motion is denied.

It may also be deemed that the same objections made on behalf of this witness by counsel in connection with the previous witnesses have been made on his behalf, and the same matters have been received in evidence, the same stipulations and the same offers of proof made, as well as all of the other grounds and reasons for the objection?

Mr. Margolis: Yes, your Honor.

The Court: The objections will be overruled.

Does this witness desire to make a statement to the court privately?

Mr. Margolis: Yes, sir.

The Court: Very well. We will adjourn to chambers with Mr. Kasinowitz.

(Here followed statement by the witness Kasinowitz to the court in chambers, reported but not transcribed.)

The Court: Usual stipulation?

Mr. Margolis: Yes, your Honor. [182]

The Court: Mr. Kasinowitz has made a statement to the court privately in chambers, to which he has added nothing to the grounds already advocated gen-

erally and specially by his counsel in his behalf, and from which it does not appear that there is any ground of exculpation for his refusal to answer the two questions propounded to him, and from which it does not appear that his answer to them would incriminate him.

For that reason the witness is now ordered and directed immediately upon the reconvening of the grand jury to attend and answer the two questions: Do you know the table of organization of the Los Angeles County Communist Party? Do you know the names of the county officers of the Los Angeles County Communist Party?

Do you understand the order of the court, Mr. Kasinowitz?

Mr. Kasinowitz: Yes, sir.

The Court: Very well. The next matter.

Mr. Goldschein: The next witness, may it please the court, is Frank Edward Alexander.

Q. Mr. Drummond, were you in the grand jury room this afternoon when Frank Edward Alexander appeared as a witness? A. I was.

Q. Was he sworn? A. He was.

Q. Did you take down in shorthand the questions propounded to him and the answers he gave? [183]

A. I did.

Q. Will you please read those questions and answers?

“Q. (By Mr. Goldschein, Assistant Attorney General): Your name is Frank Edward Alexander, is that right? A. Yes.

“Q. Where do you live?

“A. 78 Hurlburt Street, Pasadena.

“Q. I want to let you know before we start that you are not under investigation by this grand jury for any offense. You are merely called here as a witness to give evidence that you may have of certain facts that the grand jury is interested in. Do you understand that? A. I do.

“Q. Now, do you know the names of the county officers of the Los Angeles County Communist Party?

“A. I refuse to answer that on the basis it may incriminate me.

“Q. You mean that to answer that question would tend to incriminate you for the violation of a Federal offense?

“A. I just refuse to answer on the basis that it might incriminate me.

“Q. Do you know what the word incriminate means? A. I do. [184]

“Q. Well, let me explain it to you. The word incriminate in connection with this matter means this: that you say that the answer that you may give to the question I asked will tend to involve you in the violation of one of the Federal laws. Is that your understanding of the term incriminate?

“A. I believe so.

“Q. Sir? A. I believe so.

“Q. And you refuse to answer that question?

“A. On the basis that it may incriminate me.

“Q. Do you know the table of organization and the duties of the county officers of the Los Angeles County Communist Party?

“A. I refuse to answer that on the basis it might incriminate me.

“Mr. Goldschein: All right. Wait outside in the anteroom, will you?

“Mr. Carter: You are not excused from attendance. You are still in attendance on the grand jury.”

Mr. Goldschein: We insist, may it please the court, that the witness has no privilege against self-incrimination and request that the court instruct the witness that he must answer the questions. [185]

The Court: It may be deemed that the motion for a continuance is made on all of the grounds and for the reasons heretofore assigned?

Mr. Margolis: Yes, your Honor.

The Court: That motion is denied.

It may be also deemed that the same objections to the granting of the motions are made on behalf of this witness, on the matters introduced in evidence, the stipulations, and all of the grounds and for the reasons assigned in connection with the other matters, and that the same offers of proof were made?

Mr. Margolis: And the same evidence was offered and received.

The Court: The same evidence received, and stipulations.

Mr. Margolis: Yes, your Honor.

The Court: Very well. The objections are overruled.

Does this witness desire to make a statement?

Mr. Margolis: Yes, sir.

The Court: Very well. We will adjourn to chambers.

(Here followed statement by the witness Alexander to the court in chambers, reported but not transcribed.)

The Court: The same stipulation with regard to the grand jury?

Mr. Margolis: Yes, your Honor.

Mr. Goldschein: Yes. [186]

The Court: The witness Alexander has made a statement to the court privately and his statement has added nothing to the grounds which have heretofore been urged on his behalf by his counsel, and has indicated nothing which is in exculpation of his refusal to answer the question, and which has indicated nothing which will tend to show that the answers to them would incriminate or tend to incriminate him.

For that reason the witness is now ordered and directed to answer the two questions——

The Witness: Now, do you know the names of the county officers of the Los Angeles County Communist Party? Do you know the table of organization and the duties of the county officers of the Los Angeles County Communist Party?

The Court: Mr. Alexander, you are ordered and directed immediately upon the reconvening of the grand jury, to be in attendance upon them and to answer those two questions.

Do you understand the order of the court?

Mr. Alexander: Yes, I do.

The Court: Very well. The next matter.

Mr. Goldschein: The next and last witness, may it please the court, is Henry Steinberg.

Q. Mr. Drummond, were you in the grand jury room this afternoon when Henry Steinberg, the witness, was called before the grand jury?

A. Yes, sir. [187]

Q. Was he placed under oath?

A. He had been placed under oath this morning.

Q. All right, sir.

Did you take down the questions propounded to him and the answers he gave? A. I did.

Q. Will you read the questions and answers, please? A. Beginning with the morning?

Q. Beginning with the morning session.

A. "Q. (By Mr. Goldschein): Your name is Henry Steinberg? A. That is right, sir.

"Q. Where do you live, sir?

"A. 4416 Connelly Street, Los Angeles.

"Q. Mr. Steinberg, you are subpoenaed to appear before this grand jury merely as a witness, to testify to some matters that they are interested in officially. Now, we are not investigating you, and all we want from you is what information you have on the matter at hand. Now, do you know the names of the county officers of the Los Angeles County Communist Party?

"A. Can I have legal counsel in this? Am I entitled to legal counsel?

"Q. Yes, you are. [188]

"A. Can I get legal counsel?

"Q. Have you counsel available?

"A. I can get in touch with counsel, I think.

"Q. Are you fearful that this may involve you in any way?

"A. No, but I do not want to incriminate myself nor degrade anyone in answering any of the questions before this grand jury.

"Q. Do you understand what the term incriminate means, Mr. Steinberg?

"A. I would like to see counsel before I answer any questions, so that I do not incriminate myself.

"Q. Do you know what the term incriminate means?

"A. I would like to see counsel before I in any way discuss any of the questions that you might ask of me.

"Mr. Carter: You are not entitled, of course, to have counsel with you in the grand jury room. You understand that, don't you?

"The Witness: I would like to have counsel, though, before answering any questions.

"Mr. Goldschein: It is now 20 minutes after 10:00. Will it take longer than 10 minutes to reach him by phone?

"The Witness: I can call and try to get him [189] here.

"Mr. Goldschein: We will expect you back at 10:30.

"Mr. Carter: You are not excused from attendance, you understand that, Mr. Steinberg."

Then he was recalled at 2:40 o'clock this afternoon.

Q. Will you read that, please.

"Q. (By Mr. Goldschein): Mr. Henry Steinberg recalled. Mr. Steinberg, you asked to be recessed so that you could consult with counsel. Now, that was at 10:20. It is now 20 minutes of 3:00. I want to

ask you the question I asked you this morning that you did not answer. Do you know the names of the county officers of the Los Angeles County Communist Party?

"A. To answer that question, sir, would tend to incriminate or degrade me.

"Q. Incriminate you for what?

"A. In speaking to my counsel, they contend that to answer questions of that type would tend to do that, sir.

"Q. Tend to do what?

"A. Tend to incriminate or degrade me.

"Q. Tend to incriminate you for violation of a Federal offense? [190]

"A. Might tend to incriminate me in some manner if I answer the question.

"Q. Do you know what the word incriminate means?

"A. I think I do, based upon discussions with counsel.

"Q. Let me explain it to you. The term incriminate as used here means to involve you in the violation of a Federal law. Do you mean that you refuse to answer this question because to answer it may give evidence that would tend to involve you in the violation of a Federal offense?

"A. Not necessarily, sir, but to answer that question may tend to incriminate me in a way that I do not know, and pending my ability to discuss with counsel the specific question, I would have to answer on that basis, sir.

"Q. You refuse to answer?

"A. I do not refuse to answer, sir, but I have answered in the best manner in which I can.

"Mr. Goldschein: Will you step aside and wait in that room? Wait just a minute. Will you resume your seat, please?

"Q. Do you know the table of organization and duties of the officers of the Communist Party of [191] Los Angeles County?

"A. I can't answer that either, sir, on the basis that it may incriminate or it may degrade me.

"Q. You refuse to answer that on that grounds?

"A. No, I do not, sir. I do not refuse to answer, but I am acting on the basis of my counsel's information, that that should be answered in the manner in which I am answering now and no other manner. But I do not refuse to answer, sir. That is the only way in which I can answer that question, sir.

"Mr. Goldschein: All right, that is all.

"Mr. Carter: You are not excused from attendance.

"Mr. Goldschein: Just wait in the outer room."

Mr. Goldschein: We insist, may it please the court, that the witness has no privilege against self-incrimination on the questions propounded to him. They pertain to other people. We ask the court to instruct the witness that he must answer the questions.

The Court: It may be deemed the same motion for a continuance is made in connection with this matter on all of the grounds and for the reasons assigned in connection with the previous matters?

Mr. Margolis: Yes, your Honor. [192]

The Court: The motion for a continuance is denied.

It may be also deemed that all of the objections heretofore urged on behalf of the previous witnesses have been urged, and all of the grounds and reasons on behalf of this witness, that the same material has been received in evidence, the same stipulations and that the same offers of proof have been made?

Mr. Margolis: Yes, your Honor.

The Court: It will be the same ruling. The objections are overruled.

Does this witness desire to speak privately to the court?

Mr. Margolis: Yes, your Honor.

The Court: Very well. Mr. Steinberg, we will adjourn to chambers.

(Here followed statement by the witness Steinberg to the court in chambers, reported but not transcribed.)

The Court: The same stipulation concerning the presence of the grand jury?

Mr. Goldschein: Yes.

Mr. Margolis: Yes, your Honor.

The Court: The witness, Mr. Steinberg, has made a statement to the court privately and in his statement nothing has been added to the grounds heretofore urged by counsel in objection to the motion of the government to compel him to answer the questions, nor has anything been stated which would [193] tend to exculpate him from answering the questions, nor has anything been stated by the witness which

would show that the answers to them would incriminate or tend to incriminate him.

For that reason, and the reasons heretofore assigned, the witness Steinberg is now ordered and directed to attend the grand jury immediately upon the reconvening and to answer the following questions—will you read them, please?

The Witness: Now, do you know the names of the county officers of the Los Angeles County Communist Party?

The Court: That is the first question.

The Witness: Do you know the table of organization and duties of the officers of the Communist Party of Los Angeles County?

The Court: That is the second question.

Mr. Steinberg, do you understand the order?

Mr. Steinberg: Yes, sir.

The Court: Very well. That disposes of the motions made by the government in connection with the various witnesses.

Is it your desire that the grand jury shall now reconvene?

Mr. Goldschein: Yes, sir. We ask that the witnesses be instructed to appear forthwith before the grand jury that is now convening.

The Court: The grand jury will now reconvene in their [194] quarters provided for them on the sixth floor, and the witnesses are now ordered and directed, and each of them, to appear forthwith in attendance upon the grand jury and to answer the questions heretofore indicated as required.

The witnesses and the spectators will remain in

the courtroom until the grand jury has retired and gone up the elevator. The court will remain in session.

(The grand jury retired from the courtroom at 10:00 o'clock p.m.)

Mr. Goldschein: One other matter before the court recesses. The court, of course, is instructing the witnesses with reference to specific questions?

The Court: That is correct.

Mr. Goldschein: That doesn't limit the grand jury in its investigation at all?

The Court: Nothing is before me concerning the limits of any investigation at all. The only matters that are before me are whether or not these witnesses shall or shall not be required to answer specific questions, and I have ruled on each of those matters.

Is it your desire that the court remain in attendance?

Mr. Goldschein: Yes, may it please the court.

The Court: Until the grand jury recesses for the night?

Mr. Goldschein: Yes, sir.

The Court: Very well. The court is in recess.

(Short recess.) [195]

Los Angeles, California,
October 25, 1948, 10:35 o'clock p.m.

The Court: Mr. Goldschein?

Mr. Goldschein: May it please the court, all the ten witnesses have appeared before the grand jury, been recalled and each one categorically refuses to

answer the questions as directed by the court, except one witness who did answer the question as to her husband's occupation but refused to answer the other questions directed by the court.

I would like to introduce the court reporter to read the questions asked of each of the witnesses and the answers given.

The Court: The Clerk will call the roll of the grand jury.

(Roll call of the grand jury by the Clerk.)

The Clerk: A quorum is present, your Honor.

The Court: Very well. The reporter will be sworn again.

E. L. DRUMMOND

called as a witness by and in behalf of the government, having been previously duly sworn, was examined and testified as follows:

Mr. McTernan: Your Honor, we have a motion to address to the court. May we do so at this time before the witness is interrogated?

The Court: I did not hear you. [196]

Mr. McTernan: I say, we have a motion to address to your Honor. May we do so at this time before the witness is interrogated?

The Court: What is your motion?

Mr. McTernan: The motion, your Honor, is for a continuance. These witnesses were subpoenaed before daybreak today. They have been consulting with their attorneys or have been in constant attendance upon the grand jury or this court all day. Counsel have been either in consultation with their clients or in attendance upon this court all day. It is now a

quarter of 11:00 at night on the same day that these people were subpoenaed before daybreak.

The Court: There is no evidence in the record that they were subpoenaed before daybreak.

Mr. McTernan: We will be glad to put evidence in the record on that subject, your Honor. We have counsel's statement that he began receiving telephone calls from these people beginning sometime around 7:00 o'clock this morning, and these calls dealt with the question of subpoenas, and that he has been in consultation with them since.

If your Honor wants sworn testimony on that we will be very happy to provide it here in support of our motion, and we request that we be given that opportunity.

The defendants, your Honor, are tired. Counsel are tired. We have never had an opportunity adequately to prepare [197] for this kind of blitzkrieg which the United States Attorney has thrown at these witnesses and counsel today, adequately to represent these people in the proceeding now at which their liberty is at stake. We submit it requires a continuance, not only for time to adequately prepare but in order that counsel and the defendants may be in proper physical condition adequately to present their defense.

I for one, and I am sure that my associates, feel that after being engaged in a matter for something in excess of 15 hours, either in consultation with people under subpoena or in attendance upon the court and grand jury, severely taxes our energies and our

abilities as lawyers to do the job for which we have been retained.

We feel we could no more serve our clients or act properly as officers of this court in advising the court on the law, as we see it now, than if we were compelled to go through this for even 15 hours more.

We earnestly submit that these factors alone are sufficient factors to justify the court in continuing this matter.

Moreover, there are a number of things to be introduced into evidence in defense of the charges which now are about to be presented. We have proof that we want to submit in connection with the indictments which have been brought in New York, rulings of the court in those indictments, evidence concerning the Attorney General's statement of intent to bring [198] indictments and cause grand jury investigations to be initiated in Los Angeles.

We have evidence concerning the Attorney General's findings under Executive Order 9835, the stated policy of the Department of Justice concerning the deportation of persons from this country based solely on their membership in the Communist Party.

We have all of the complex evidence which goes into a proper submission of the challenge to the grand jury panel. We have evidence which we wish to submit concerning——

The Court: Counsel, all those matters of evidence were gone into this morning and again this afternoon and this evening, and I passed on the matter that the witnesses here were in no legal position

to introduce evidence or to make those challenges, and a mere repetition of it does not make it any more legal.

Mr. McTernan: These people, we submit, are no longer witnesses, but are defendants charged with an offense against this court, and this offense with which they are charged grows out of the proceedings of the grand jury, which we claim has no basis in law and is invalidly constituted. The entire proceeding upon which these charges rest are a legal nullity. We ask for an opportunity to prove this to your Honor.

We also have evidence which we wish to submit in connection with our claim that there has been in connection with [199] the grand jury proceeding and the charges which are about to be submitted to your Honor, which have been outlined by counsel for the government, denies these defendants the equal protection of the law.

Now for all of these reasons, your Honor, and because we have additional legal matters which we wish to call to your attention, the law respecting the right of organization and free speech under the First Amendment, which was only briefly sketched to your Honor in the proceeding sometime during the 15 hours which preceded the initiation of this proceeding, we wish to call your Honor's attention in detail, and we wish to argue it at considerable length.

Now the authorities are numerous. The exposition of them will be lengthy. We, as I said before, have had little opportunity to prepare for this proceeding which, as I said, began before daybreak this morning with the simultaneous service of subpoenas on a

large number of people in their homes before they were out of bed.

The law on the privilege against self-incrimination is a complicated subject. The case of *Counselman v. Hitchcock*, which has been discussed here at length, has been cited at least a hundred times according to Shepard's citator since that decision. We have had no adequate opportunity to examine this law. We have had no adequate opportunity to organize an argument based upon the decisions of the United States Supreme [200] Court.

The Court: Let me see. Cannot the court take judicial notice of matters of common knowledge?

Mr. McTernan: I believe that to be the law generally.

The Court: Is it not a matter of common knowledge that Mr. Margolis and the same firm that is here have represented other people charged with contempts of Congress in connection with the general proceeding as to whether or not they were or ever had been a member of the Communist Party?

Mr. McTernan: Your Honor, in no case that Mr. Margolis has acted, in no case in which our firm has acted, as to which you refer, the alleged contempts of Congress, has it involved the privilege against self-incrimination, which was not claimed.

The Court: Have you—are you suggesting you have not heretofore examined *Counselman v. Hitchcock*? [201]

Mr. McTernan: I am not suggesting that. I am suggesting that there is considerable law in the courts, only part of which we indicated to your

Honor in argument this afternoon, which show that the position of the government in attempting to limit *Counselman v. Hitchcock* is not well taken. We are telling you that as lawyers we have not been given an adequate opportunity to prepare the law in this subject since this matter was raised, as we said before, by subpoenas which were served at the break of day, before people were out of their beds, and we have had so much to do, and we have been in such constant attendance upon either this court or outside the grand jury room advising clients, that we have not had an opportunity adequately to prepare this law, and we think that we are entitled to do that as officers of this court and people representing clients charged with offenses against this court in which they may lose their liberty.

The Court: I do not know that they are charged with a criminal offense.

Mr. McTernan: Whether the offense is criminal or not in nature, your Honor, the fact remains——

The Court: They are not yet charged with anything.

Mr. McTernan: Counsel has just stated to your Honor that they have not answered the questions which the court directed them to answer. I think we can take notice of a matter of common knowledge, that you are about to be asked to [202] confine these people to jail, either for a definite period or until they answer the questions which have been put to them. These people have been routed out of bed, they even haven't had a chance to contact their families during the period that they have been here.

The Court: They have had opportunity to consult counsel, have they not?

Mr. McTernan: They have had an opportunity to consult counsel, yes. I have told you the limitations under which counsel have worked all day. I am sure your Honor will agree that there are few situations in which lawyers are called out of bed to handle cases of this kind.

The Court: It depends on how late they sleep, counsel.

Mr. McTernan: The question, your Honor, is how much opportunity they have had to prepare themselves to research the law and to equip themselves to defend the position in court on which their clients stand the risk of losing their liberties. We submit to your Honor that we have not had such an opportunity.

For all of the reasons that I have stated to you before, we request at this time that your Honor continue this proceeding for a reasonable period to permit counsel to prepare themselves and to permit counsel and the defendants to appear before you at a time when they are fresh and not exhausted by 15 hours of proceeding before this court or before [203] the grand jury.

The Court: Well, now, the proceedings began at 10:00 o'clock this morning.

Mr. McTernan: The 15-hour period, your Honor, I count from the time that they were served with subpoenas and I fix that at approximately 7:00 o'clock, which is the time we received our first call.

The Court: I see. The grand jury proceedings began at 10:00 o'clock this morning?

Mr. McTernan: I don't know. I assume so.

The Court: I think the first appearance in court here was around 10:30 or a quarter of 11:00. I received the matter on my calendar about 11:30 or 25 minutes of 12:00.

Mr. Margolis: I was in Judge Yankwich's court a few minutes after 10:00. I was here at 10:00 o'clock but looking for Judge McCormick and finding out what the situation was, and Judge Yankwich ordered us to wait in his court room at that time, and we waited there for—I don't know exactly how long; I didn't notice the exact period of time—until we came into your Honor's court.

The Court: I see. Have you concluded your statement?

Mr. McTernan: Yes, I have, your Honor.

The Court: Do you wish to be heard, Mr. Goldscheim?

Mr. Goldscheim: No, I think the court knows the situation. The members of this grand jury have also been here [204] since 9:00 o'clock this morning. They also are away from their homes, their families and their business on the business of the government. They too are tired, just as counsel on the other side are—I am talking about counsel for the government—and I assume the court as well.

I am not going to burden the court with any lengthy argument on this. I think the court knows what the situation is. This grand jury is obstructed by the concerted action of 10 people who answer categorically

in the same way, and we think, may it please the court, in order for the grand jury to continue its business that some reaction is required.

The Court: Is it the desire of the grand jury to proceed this evening?

Foreman Ahlswede: It is, your Honor.

The Court: Very well. The motion to continue is denied.

Proceed.

Direct Examination

By Mr. Goldschein:

Q. Mr. Drummond, were you in the grand jury room when Henry Steinberg returned to the grand jury to answer the questions as directed to him by the court? A. I was.

Q. Were you present and did you take down the questions that were propounded to him and the answers he made? [205]

A. I did.

The Court: Before you proceed, counsel, I think I'd better also make the statement that in connection with the matter and the hours that the court is keeping, under the rules of this court, with the eight judges, there is a rule of court which requires one judge to handle all criminal matters for a period of four months at a time. It so happens that I have been designated as that judge.

It so happens also that the trials that are set before me begin tomorrow morning at 10:00 o'clock will require the attendance of a jury, a panel, from which a jury will be selected, to be succeeded imme-

diately by another trial. I know of no other judge that is available to hear this matter or to proceed with it.

I know also that the business of the government in connection with other criminal matters, in connection with the convenience of juries, witnesses, defendants, lawyers and other counsel, require me in adherence to my duty to proceed with the trial of those cases tomorrow.

I confess that I would much prefer to be doing other things than be sitting here so late at night. I confess also that I get a little more tired now than I used to 30 years ago.

That is all I have to say.

Mr. McTernan: Your Honor, may I respectfully point this [206] out, that the fact that the court may not have adequate facilities with which otherwise to try these people does not justify or excuse the procedure which we think violates their rights, and the prolonging of this proceeding in this fashion is denying us due process of law.

We wish the record to show that so that our claim will be absolutely clear.

The Court: Very well.

Q. (By Mr. Goldschein): Mr. Drummond, will you please read the questions propounded to the witness and the answers he gave.

The Court: This is the witness?

Mr. Goldschein: Steinberg; Henry Steinberg.

The Witness: Henry Steinberg.

“Q. (By Mr. Goldschein): Mr. Henry Steinberg recalled. Mr. Steinberg, I want to ask you the questions you were asked this morning.

"Mr. Carter: Let us have the reporter read them.

"Mr. Goldschein: All right. Now, Mr. Court Reporter, will you read the question propounded to the witness this morning which the court directed him to answer.

"(Question read as follows:

"'Q. Do you know the names of the county officers of the Los Angeles County Communist Party?' "

"The Witness: I refuse to answer, sir, on the ground it may tend to incriminate me.

"Mr. Goldschein: Now read the next question.

"('Q. Do you know the table of organization and duties of the officers of the Communist Party of Los Angeles County?')

"The Witness: I will refuse to answer that question, sir, on the basis it might tend to incriminate me.

"Q. (By Mr. Goldschein): You recall that the court instructed you to answer those two questions?

"A. I refuse to answer those questions on the basis that they may incriminate me, sir.

"Q. I understand, but do you recall that the court directed you to answer those?

"A. Yes, sir.

"Q. And you still refuse to answer?

"A. I refuse to answer those questions on the basis they may tend to incriminate me, yes sir.

"Mr. Goldschein: Step outside and wait there, please."

Mr. Goldschein: Mr. Steinberg is in the court room, I [208] understand. We insist, may it please the court, that this is in direct violation of the instruction of the court and requires some reaction to compel him to answer.

The Court: What is your motion?

Mr. Goldschein: We move that the witness be committed to jail until such time as he answers the question.

The Court: Proceed with the next witness.

Mr. McTernan: Your Honor, with reference to presenting a defense, are we going to hear the motions of government counsel on each of the witnesses before you hear from the defense?

The Court: I think so. I think it will save time. Then we will not be too late and everyone will not be too tired.

Mr. McTernan: Don't let my silence be deemed acquiescence.

Mr. Goldschein: May it please the court, may the court reporter read all the questions and answers?

The Court: I think you had better proceed as to each one.

Mr. Goldschein: All right.

Q. What is the next witness that appeared before the grand jury, Mr. Drummond?

A. Margaret Iris Noble.

Q. Will you read the questions propounded to her and the answers she gave, please?

A. "Q. (By Mr. Goldschein): Mrs. Margaret Iris Noble recalled. Mrs. Noble, we will have the

court [209] reporter read to you the questions that the court directed you to answer.

"Now, Mr. Reporter, will you read them?

"(Question read as follows:

"('Q. Do you know the names of the county officers of the Los Angeles County Communist Party?')

"The Witness: I refuse to answer that question on the ground that it might incriminate me.

"Q. (By Mr. Goldschein): You recall, Mrs. Noble, that the court directed you to answer that question specifically, do you not? A. Yes.

"Q. Will you answer out so the reporter will hear you?

"A. I refuse to answer that question on the grounds that it may incriminate me.

"Q. Do you recall, Mrs. Noble, that the court just directed you to answer that question?

"A. Yes.

"Q. And you still refuse?

"A. I refuse on the ground that it might incriminate me.

"Mr. Goldschein: Will you read the next question please, Mr. Reporter? [210]

"(Question read as follows:

"('Q. Do you know the table of organization of the Los Angeles County Communist Party?')

"The Witness: I refuse to answer that question on the ground that it might incriminate me.

"Q. (By Mr. Goldschein): Do you recall that the court directed you to answer that question, Mrs. Noble? A. Yes.

“Q. And you still refuse? A. Yes.

“Mr. Goldschein: Will you read the next question?

“(Question read as follows:

“(‘Q. What is his occupation?’)

“Q. (By Mr. Goldschein): What is your husband’s occupation?

“A. I told you that before. He is a free lance writer.

“Mr. Goldschein: Eliminate that. Will you read the next question?

“(Question read as follows:

“(‘Q. Do you know Mr. Ned Sparks?’)

“The Witness: I refuse to answer that question on the ground that it might incriminate me.

“Q. (By Mr. Goldschein): You recall that the court instructed you to answer that question?

“A. Yes.

“Q. And you still refuse?

“A. I refuse on the same grounds.

“Mr. Goldschein: What is the next question?

“(Question read as follows:

“(‘Q. Do you know Mr. Vincent Russo?’)

“Mr. Goldschein: We will strike that question.

“Q. Mrs. Noble, you are still refusing to answer all those questions?

“A. I refuse on the grounds that I have given.

“Mr. Goldschein: All right. Will you wait in the anteroom, please, Madam?”

Mr. Goldschein: We move, may it please the court, that the witness be committed to the cus-

tody of the marshal until she answers these questions.

The Court: Very well. Proceed with the next one.

Q. (By Mr. Goldschein): Will you read the next, please?

A. The next was Wesley Bissey.

“Q. (By Mr. Goldschein): Mr. Bissey, have a chair, please, sir. Mr. Wesley Bissey recalled. Mr. Court [212] Reporter, will you please read the questions that the court directed Mr. Bissey to answer?

“(Question read as follows:

“(‘Q. Do you know the names of the county officers of the Los Angeles County Communist Party?’)

“Q. (By Mr. Goldschein): Will you answer that question, Mr. Bissey?

“A. I refuse to answer that question on the ground that it will incriminate me.

“Mr. Goldschein: Will you read the second question, please, sir?

“(Question read as follows:

“(‘Q. Do you know the table of organization of the Los Angeles County Communist Party?’)

“The Witness: I refuse to answer this question on the ground that it may incriminate me.

“Mr. Goldschein: Will you read the next question, please, Mr. Reporter?

“(Question read as follows:

“(‘Q. Do you know Mr. Ned Sparks?’)

“The Witness: I refuse to answer this question on the same grounds.

“(Question read as follows:

“(‘Q. Do you know Mr. Vincent Russo?’)

“Mr. Goldschein: We will eliminate that. [213]

“Q. Mr. Bissey, you recall that the court directed you specifically to answer those three questions? A. I do.

“Q. And you still persist in your refusal?

“A. I stated my reasons, sir.

“Q. And you won’t answer them?

“A. I refuse to answer them on the grounds that they might incriminate me.

“Mr. Goldschein: All right, sir. Will you wait in the anteroom, please?”

Q. Will you read the questions asked of the next witness?

A. The next one is Ben Dobbs.

Mr. Goldschein: Excuse me, Mr. Court Reporter.

Your Honor, I didn’t make the motion at the end of the reading of the testimony of the last witness. We respectfully move that the witness be committed until such time as the questions are answered.

The Court: Very well. Proceed.

Q. (By Mr. Goldschein): Will you read the questions propounded and the answers given by the next witness, please?

A. “Mr. Goldschein: Mr. Ben Dobbs recalled.

“Mr. Court Reporter, will you please read the

questions that the court instructed Mr. Dobbs to answer?

“(Question read as follows:

“(‘Q. Do you know the names of the County officers of the Los Angeles County Communist Party?’)

“The Witness: I refuse to answer that question on the ground it may tend to incriminate me.

“Mr. Goldschein: Mr. Reporter, will you read the next question, please?

“(Question read as follows:

“(‘Q. Do you know the table of organization of the Los Angeles County Communist Party?’)

“The Witness: I refuse to answer that question on the ground it may incriminate me.

“Mr. Goldschein: The next, Mr. Reporter.

“(Question read as follows:

“(‘Q. What is your occupation, sir?

“(‘A. I am an organizer.

“(‘Q. For what organization?’)

“The Witness: I refuse to answer that question on the grounds that it may incriminate me.

“Mr. Goldschein: Now read the next question.

“(Question read as follows:

“(‘Q. Do you know Mr. Ned Sparks?’) [215]

“The Witness: I refuse to answer that question on the same ground.

“Mr. Goldschein: Was there another question?

“(Question read as follows:

“(‘Q. Do you know Mr. Vincent Russo?’)

“Mr. Goldschein: We will eliminate Mr. Russo.

“Q. Mr. Dobbs, this morning or this afternoon

when you were before this grand jury you were asked the question, 'Do you know Mr. Vincent Russo?' and you claimed your privilege against self-incrimination. A. I did.

"Q. You don't know Mr. Vincent Russo, do you? A. No.

"Q. And you had no basis for claiming the privilege of self-incrimination on that question, did you, because you didn't know Mr. Vincent Russo?

"A. I refused to answer that question because of the fear it might incriminate me. Now, since then Mr. Russo has been identified to me and I can say I don't know him.

"Mr. Goldschein: I see. All right. Was there another question that the court instructed the witness to answer, Mr. Court Reporter?

"The Reporter: No. [216]

"Q. (By Mr. Goldschein): Mr. Dobbs, you recall that the court directed you to answer those questions? A. I do, sir.

"Q. And you persist in your refusal to answer them? A. I do, sir.

"Mr. Goldschein: All right, sir. Will you wait in the adjoining room?"

Mr. Goldschein: We move, may it please the court, that the witness be committed until such time as he answers the question.

The Court: Very well. Proceed.

Q. (By Mr. Goldschein): Mr. Court Reporter, will you please read the questions propounded to the next witness and the answers he gave?

A. The next witness is Delphine Murphy Smith.

"Mr. Goldschein: Will you take a chair, please, Madam? Mrs. Delphine Murphy Smith recalled. Will you please, Mr. Court Reporter, read the question put to Mrs. Smith that the court ordered her to answer?

"(Question read as follows:

"('Q. Do you know the names of the County Officers [217] of the Los Angeles County Communist Party?')

"Q. (By Mr. Goldschein): Will you answer that question, please, Madam?

"A. No. I still refuse to answer on the same ground.

"Mr. Goldschein: Will you read the next question, Mr. Reporter?

"(Question read as follows:

"('Q. Do you know the table of organization of the Los Angeles Communist Party?')

"The Witness: I still refuse to answer on the same ground.

"Mr. Goldschein: What is the next question?

"(Question read as follows:

"('Q. What does your husband do?')

"The Witness: I will answer that question. My husband is a steel worker.

"Q. (By Mr. Goldschein): Then the answer to that question in no way incriminates you, does it?

"A. No.

"Q. And you had no basis for claiming it this morning, did you?

"A. I refuse to answer that on the basis it may incriminate me.

“Q. I know you did, but you had no basis? [218]

“A. No, I refuse to answer your question now.

“Mr. Goldschein: All right. Will you read the next question?

“(Question read as follows:

“(‘Q. Do you know Mr. Ned Sparks?’)

“The Witness: I refuse to answer that question on the ground it might incriminate me.

“Q. (By Mr. Goldschein): Mrs. Smith, you recall that the court directed you specifically to answer those questions? A. Yes, I do.

“Q. And you still persist in your refusal?

“A. I do.

“Mr. Goldschein: All right, Mrs. Smith, will you wait in the anteroom, please?

“The Witness: Yes.”

Mr. Goldschein: We move, may it please the court, that the witness be committed until the questions are answered.

Q. Will you read the questions and answers of the next witness, please?

A. The next witness is Miriam Brooks Sherman.

“Mr. Goldschein: Mrs. Miriam Brooks Sherman recalled. Mr. Court Reporter, will you please read to Mrs. Sherman the questions that the court directed that she should answer?

“(Question read as follows:

“(‘Q. They want to know from you whether or not you know the names of the county officers of the Los Angeles County Communist Party.’)

"Q. (By Mr. Goldschein): Will you answer that question, please, Madam?

"A. I still refuse to answer on the ground it might incriminate me.

"Mr. Goldschein: The next question.

"(Question read as follows:

"('Q. Do you know Mr. Ned Sparks?')

"Q. (By Mr. Goldschein): Will you answer that question, Mrs. Sherman?

"A. I also refuse to answer that question on the same ground.

"Mr. Goldschein: And the next question, Mr. Court Reporter.

"(Question read as follows:

"('Q. Are you employed?

"('A. Yes, I am employed.

"('Q. Where?')

"The Witness: I refuse to answer that question on the ground it might incriminate me.

"Mr. Goldschein: Was the witness instructed to answer the question with reference to the table of organization of the Communist Party?

"The Reporter: That was not asked.

"Mr. Carter: Let me ask one question.

"Q. Are you presently employed by the federal government?

"A. I refuse to answer that question on the ground that it may incriminate me.

"Q. (By Mr. Goldschein): Mrs. Sherman, you recall that the court directed you to return to this grand jury room and answer the questions?

"A. Yes, I do.

“Q. And you persist in your refusal?

“A. I do.

“Mr. Goldschein: All right. Will you wait in the anteroom, please?

Mr. Goldschein: We ask, may it please the court, that the witness be committed until she answers the questions?

The Court: Proceed.

Q. (By Mr. Goldschein): The next witness.

A. The next witness was Phillip Bock.

“Mr. Goldschein: Mr. Bock, will you take a chair, please? Mr. Phil Bock recalled.

“Mr. Court Reporter, will you please read to [221] Mr. Bock the questions that the court directed him to answer?

“(Question read as follows:

“(‘Q. Do you know the names of the county officers of the Los Angeles County Communist Party?’)

“Q. (By Mr. Goldschein): Will you answer that question, please, sir?

“A. I refuse to answer that question on the ground that it may tend to incriminate me.

“Mr. Goldschein: Will you read the next question?

“(Question read as follows:

“(‘Q. Do you know the table of organization of the Los Angeles County Communist Party?’)

“Q. (By Mr. Goldschein): Will you answer the question, Mr. Bock?

“A. I refuse to answer that question on the ground that it might tend to incriminate me.

"Mr. Goldschein: Mr. Reporter, will you please read the next question the court ordered the witness to answer?"

"(Question read as follows:

"('Q. What is your occupation, sir?

"('A. I am an organizer?

"('Q. For whom?') [222]

"Q. (By Mr. Goldschein): Will you answer that question, Mr. Bock?

"A. I refuse to answer that question on the ground that it may tend to incriminate me.

"Q. Mr. Bock, of course you recall that the court directed you just a few minutes ago to answer those questions, do you not?

"A. Yes, sir.

"Q. And you persist in your refusal?

"A. Yes, sir.

"Mr. Goldschein: All right, sir. Will you wait in the anteroom?"

Mr. Goldschein: May it please the court, we move that the witness be committed until such time as the questions are answered.

The Court: Proceed with the next one.

Q. (By Mr. Goldschein): Will you proceed?

A. The next one was Dorothy Baskin Forest.

"Mr. Goldschein: Will you take the chair, please, Mrs. Forest. Mr. Court Reporter, will you please read to Mrs. Forest the two questions the court directed her to answer?

"(Question read as follows:

"('Q. Do you know the names of the county

officers of the Los Angeles County Communist Party?')

"Q. (By Mr. Goldschein): Will you please answer that question, Mrs. Forest?

"A. I refuse to answer the question on the ground it might incriminate me.

"Mr. Goldschein: Mr. Reporter, the next one, please.

"(Question read as follows:

"('Q. Do you know the table of organization and duties of the officers of the Los Angeles County Communist Party?')

"Q. (By Mr. Goldschein): Will you answer that question, please, Mrs. Forest?

"A. I refuse to answer that question on the ground it might incriminate me.

"Q. Mrs. Forest, you recall that the court just a few minutes ago directed specifically to answer those two questions? A. I remember.

"Q. Won't you please answer them?

"A. I refuse to answer on the ground that it might incriminate me.

"Q. You persist in your refusal?

"A. I do. [224]

"Mr. Goldschein: All right. Will you wait in the next room, please?"

Mr. Goldschein: May it please the court, we move the witness be committed until such time as the questions are answered.

The Court: Next witness.

Q. (By Mr. Goldschein): Will you proceed with the next one?

A. The next one is Samuel Harry Kasinowitz.

“Mr. Goldscheim: Mr. Kasinowitz, will you take the seat there? Samuel Harry Kasinowitz recalled. Mr. Reporter, will you please read to the witness the questions that court directed him to answer?

“(Question read as follows:

“(‘Q. Do you know the names of the county officers of the Los Angeles Communist Party?’)

“Q. (By Mr. Goldscheim): Will you answer that question, Mr. Kasinowitz?

“A. No, sir. I will have to refuse to answer that question on the same ground that I refused before, that it might incriminate me.

“Mr. Goldscheim: Will you read the next question, please, sir?

“(Question read as follows: [225]

“(‘Q. Do you know the table of organization of the Los Angeles County Communist Party?’)

“The Witness: My answer is the same.

“Q. (By Mr. Goldscheim): Will you answer that?

“A. I say my answer is the same as to the previous question, that by answering that question I might incriminate myself.

“Q. Will you answer that question the court reporter read to you?

“A. I will have to refuse to answer that question on the ground that that, too, might incriminate me.

“Q. Mr. Kasinowitz, the court just a few minutes ago directed you to answer those questions, do you recall that? A. Yes, sir.

“Mr. Goldschein: All right, sir. Will you wait in the next room?”

The Court: What were those questions, the table of organization and names of the county officers?

The Witness: Yes, your Honor. Two questions.

The Court: Very well.

Mr. Goldschein: May it please the court, we move the witness be committed until such time as the questions are answered. [226]

The Court: Proceed with the next one.

Q. (By Mr. Goldschein): Will you do so, Mr. Reporter?

A. The next witness is Frank Edward Alexander.

“Mr. Goldschein: Will you take a chair, Mr. Alexander? Frank Edward Alexander recalled. Mr. Court Reporter, will you please read the questions that the court ordered Frank Edward Alexander to answer?”

“(Question read as follows:

“(Q. Do you know the names of the county officers of the Los Angeles County Communist Party?)”

“Q. (By Mr. Goldschein): Will you answer that question, please, sir?”

“A. I refuse to answer on the ground that it might incriminate me.

“Mr. Goldschein: Will you read the next question?”

“(Question read as follows:

“(Q. Do you know the table of organization

and the duties of the county officers of the Los Angeles County Communist Party?")

"Q. (By Mr. Goldschein): Will you answer that question, please, sir?

"A. Likewise I refuse to answer that on the ground that it may incriminate me.

"Mr. Goldschein: The next question, Mr. Reporter.

"The Reporter: That is all.

"Q. (By Mr. Goldschein): Do you recall that the court just a few minutes ago directed you to answer those questions? A. I do.

"Q. And you persist and still persist in your refusal to answer those questions?

"A. On the ground that it might incriminate me.

"Mr. Goldschein: All right. Will you wait in the next room, please?"

Mr. Goldschein: We move, may it please the court, that the witness be committed until such time as the questions are answered.

The Court: That is all of the ten witnesses?

The Witness: That is all the witnesses.

The Court: Very well. Do you wish to be heard, Mr. Margolis?

Mr. Margolis: Mr. McTernan has something to say.

Mr. McTernan: Your Honor please, I take it that we have just listened to something in the nature of a presentment. I renew my motion for a continuance on all the grounds stated, and point out to your Honor that it is now approximately [228] 11:15 o'clock.

The Court: 11:10 by this clock.

Mr. McTernan: My watch says 11:15.

The Court: Not that five minutes makes any difference.

Mr. McTernan: At this hour it is de minimis, I would say, your Honor.

I renew my motion on all of the grounds already stated to your Honor.

The Court: The motion for a continuance is denied.

Mr. McTernan: Now, if the court please, on behalf of each of the defendants named in the presentment which has just been read orally, we challenge the grand jury of the District Court of the United States, for the Southern District of California, Central Division, on the following grounds:

The grand jury now sitting in said district and division before whom the defendants have been subpoenaed to appear and have been interrogated——

The Court: Are these different grounds than those heretofore assigned in your written motion?

Mr. McTernan: This is a challenge to the grand jury, your Honor, which will be virtually identical with the challenge heretofore made in another connection.

The Court: If it is the same grounds which have heretofore been reduced to writing, I do not think it will be [229] *necessary* for you to repeat them.

Mr. McTernan: Very well. The record at this point will incorporate our challenge in full so that our record in this matter will be complete?

The Court: As if they had been read.

Mr. McTernan: Thank you.

The Court: And that is the written motion filed this morning on all the grounds set forth therein; that is, paragraphs 1, 2, 3 and the remainder of the motion.

Mr. McTernan: The challenge to the grand jury, your Honor, is contained in paragraph numbered 1 and the paragraph immediately following which bears no number but not in the paragraphs which bear the numbers 2 and 3.

The Court: Very well. You wish it limited to paragraph numbered 1 and the unnumbered paragraph following it but preceding 2?

Mr. McTernan: Yes. The challenge to the grand jury panel, your Honor, is set forth in paragraph numbered 1 and the paragraph which immediately follows.

First I will make that challenge and ask you for an opportunity to call witnesses. The first witness will be the jury commissioner for the District Court.

The Court: The challenge is overruled on the basis of my ruling this morning, that the witness has no legal standing to challenge the composition of the grand jury before [230] whom he is called.

Mr. McTernan: We now move to dismiss the proceedings on the grounds set forth in paragraphs numbered 2 and 3 of the motion.

The Court: And which may be incorporated in the record without repeating them *haec verba* at this time.

Mr. McTernan: Thank you.

Now in this connection, your Honor, I would like to point out a few facts which stand out rather plainly from the record that has been adduced over the hours today. It is illustrated, in a sense, by the phony Vincent Russo question that so much was made of this afternoon and which has been politely dropped before the grand jury this afternoon, or this evening, rather. This Special Assistant to the United States Attorney General was not seeking information, nor was the grand jury seeking information, concerning the defendant's knowledge of Vincent Russo. They were engaging in a gentle cat-and-mouse game with these defendants in order to trap them into something which might somehow abridge their constitutional rights or destroy the basis upon which they might claim them. And in every instance where the Vincent Russo question, which your Honor was forced to hear earlier this evening and this afternoon, and which your Honor was required through the motions made by the Special Assistant to the Attorney General to issue orders on, have now been abandoned, [231] and we submit that this illustrates the purpose of this whole proceeding before the grand jury.

These Attorney Generals and United States Attorneys and this grand jury which sits here and insists that this matter be heard tonight, regardless of whether or not these people have been ade-

quately represented, are not seeking information, your Honor. This is a political attack, and this is an attack upon the Communist Party of Los Angeles County, which is part of the nationwide attack which these gentlemen, through their boss, Tom Clark, had announced some years ago and which they are carrying out step by step.

We say that people of this country, under the Constitution and particularly the First Amendment, have a right to their political views, and they have a right to speak these political views, and they have a right to organize into their political views, and it has been recognized by the courts of this land that the right of organization, of assembly and association or affiliation, is one of the primary methods by which speech today can be made effective.

This is a right which has been recognized by one Federal judge, Judge Swaggert, in a district in the middle west—I am sorry I don't have the citation; this is one of the things that counsel haven't been able to do because of the rush of things—but this case involved an attack by the police, who were also claiming that they were seeking information on [232] union meetings were were held privately in homes, and one of the things which the police said that they were trying to assert by virtue of these raids was the names of people who belonged to the organization, because some possible illegality might be involved.

The court, by injunction, restrained the police from this kind of interference with the right of

organization because, the court said, that this was one of the fundamental rights which was guaranteed by our First Amendment and that the right to organize and the right to belong to organizations through a program, political or social in nature, could be effectuated or spoken about, that this right was a right which could be exercised privately as well as publicly, that people didn't have to join——

The Court: I notice counsel paying some attention to some uniformed officers who came in. I see a great many more people here this evening than this afternoon. This is a public hearing and anybody has a right to come in.

Mr. McTernan: Yes. My attention was directed to them—they came in behind me—by your Honor's attention to them, and so I turned around to find out what was happening. The clanking of chains always attracts my attention.

The Court: I heard no chains.

Mr. McTernan: I heard metal clanking. It sounded like chains to me. [233]

The Court: Do any of the officers who came in the room have any chains?

An Officer: No, sir. We do not, your Honor.

The Court: Very well.

Let us pursue that. I do not like to leave that implication in the record, that this court here is dangling some chains over counsel's head or otherwise.

Mr. McTernan: No, your Honor. I had no such intention in mind. I had no such implication in mind.

The Court: Did you or did you not hear any clanking of chains?

Mr. McTernan: I heard, as I said, a clanking of metal which I said sounded like chains. I didn't know the court had anything to do with the presence of these individuals.

The Court: I have nothing to do with the presence of those individuals, counsel, and I resent your implication and I think it is highly improper. I just stated that this is a public hearing and anyone has a right to come in here who desires it. My point is that you have stated for the purposes of the record and in the record that you heard a noise like the clanking of chains.

Mr. McTernan: Yes, I did say that, but I didn't attribute it to the court or connect the court with it in any way and I didn't intend to do so.

The Court: What was the noise you heard?

Mr. McTernan: I heard the clanking of metal which I [234] said sounded like chains to me. I thought I saw, as I turned around—each of them were walking towards the rear of the room—that they had handcuffs strapped to their uniforms. Perhaps it was that noise or perhaps it was some other kind of metal, but I want it clear in the record that I have made no charge against the court, either directly or indirectly, with reference to the appearance of the uniformed officers in court.

The Court: Very well.

Mr. McTernan: I was saying, at the time they entered, the court held in this case, decided by Judge Swaggert, that citizens of this country under

the First Amendment do have the right to organize privately, to assemble privately, and not to be held to account for it by investigations of law enforcement officers, and that this is a right——

The Court: Those were investigations that were made in their homes? Were they subpoenaed before a grand jury?

Mr. McTernan: No, they were not subpoenaed before a grand jury.

The Court: I think the distinction ends there, counsel.

Mr. McTernan: I am sorry that I can't agree with you, your Honor. The principle as to the right of people to be secure in the privacy of their beliefs and their associations extends to them wherever they go.

This is a right which attaches to the fact that they are [235] under the jurisdiction of the United States and that the First Amendment applies to them, and it doesn't make any difference whether they are in their homes or in the grand jury room. The right to be private in this sphere protects them wherever they are, and this is the point in the case and it is the point of my argument.

The Court: Very well.

Mr. McTernan: Similarly, and again I do not have the precise citation, but I would like an opportunity to supply it to you, a decision by the highest court of Massachusetts in *Bow v. Secretary of the Commonwealth*, in which this right of association and organization again was asserted and recognized by the court as the rights of citi-

zens to be free of being held to account by investigations of law-enforcement officers and other agents of government—this right was asserted and defended and recognized by the court.

The importance of it, your Honor, is that this is the way in which today people can speak.

The Court: Let me see. You are not arguing now that they would be incriminated if they answered these questions?

Mr. McTernan: This is not the point I am addressing myself to.

The Court: You are arguing now that in any event the government has not the right to ask these questions?

Mr. McTernan: That is correct. And that this point is [236] as important to the guarantees of free speech and the First Amendment to the Constitution as the rights of the book publisher to be free of prior censorship, such as announced in the case of *Near v. Minnesota*, or the right of people to speak through picketing, such as was recognized in *Thornhill v. Alabama*, the right of people to issue leaflets, to gather in meetings, to do this speaking in the various ways, sound trucks, radio, and so forth, that have been recognized by our courts as agencies or instrumentalities of speech. And that this right, too, the right to organize into political parties, into organizations around the issues of the day, is a right that is inextricably intertwined with the right of free speech, and that unless people can be free in the exercise of this right, par-

ticularly free of inquisition by law-enforcement officers and grand juries, the right is as nothing.

The Court: The witnesses did not advance any of those reasons as a ground for refusing to answer the questions. The witnesses only advanced the argument that they refused to answer on the ground that they might incriminate themselves.

Mr. McTernan: That is correct, but in defending them we are raising the power of the government to ask the questions which, if the government did not have the power to ask the questions, we assert that they cannot be adjudged in contempt because if there was no power to ask then there is no [237] power in the court to compel an answer, and there is therefore no power in the court to punish for failure to answer when the court's command has been given.

I want to discuss this in the historical context and terms of the attack on the Communist Party. First I want to point out that these questions which have been put here amply support our view that this is the kind of political attack which we claim it is, and that the right of free speech and free organization has been attacked, that that is the thing which is really under attack. These people, singularly enough, ten of them, are called here and identical questions are put to each. What are the names of the officers? What is the table of organization, whatever that may mean?

The Court: No, they were not asked that.

Mr. McTernan: Do you know the table of organization?

The Court: That is right.

Mr. McTernan: And do you know Ned Sparks, whom we have tried to show earlier, and will repeat our offer to prove as this hearing progresses, is reputed in this community to be an officer of the Los Angeles County Communist Party.

Now these questions on their face, your Honor, I submit are questions which bespeak an attack upon an organization. These grand juries are supposed to be here investigating the commission of crime with a view to bringing a true bill, and this, as I understand it, is their only function. [238]

These witnesses are asked not any specific unlawful acts; they are asked to identify officers, they are asked to identify organizational charts—I assume the table of organization means something like that—they are asked to identify one of the officers of the Communist Party. This is an attack upon the Communist Party. This is an effort to engage in a tactic which was advertised by the superior of these gentlemen, Mr. Tom Clark, the Attorney General, the government tactic of attacking Communists by exposure.

The members of Mr. Tom Clark's party don't have to stand up and be counted, and the members of Mr. Dewey's party don't have to stand up and be counted, but for some reason the members of the Communist Party have to stand up and be counted, to use the colloquialism, and this is the government's tactic, and this is the government's purpose, and so we will go around the country, Special Assistants to the Attorney General, and

get loyalty checks, first Denver, then Cleveland, then Los Angeles—Los Angeles was announced by Mr. Clark—going around making the Communists stand up and be counted, and the first Communists to stand up and be counted will be the officers and the people whose names fill in the organizational chart.

Why? Because Tom Clark announced quite some time ago to Congress, he advised Congress, don't outlaw this party, he said, that would be unconstitutional, that would be a bill of [239] containment, but let us make them stand up and be counted. Let us use the weapon of exposure.

And so in an effort to stifle political expression in this country, in an effort to drive people underground, to force them out of their political views, to put a penalty on the expression of their political views, the government is engaging in this political purpose of suppressing a political party by this tactic of exposure.

And how have they done it. They have built up this very well in the community, that being a Communist is to be a Pariah, that if you belong to this particular political party you are a social outcast, you can't work for the government, private blacklists are encouraged by legislative committees, if not by executive officers, people in the executive branch of the government, the FBI and other branches of the Department of Justice encourages the private employment blacklists by its activity in private industry throughout the country, and so it having been created in the public

mind that to be a member of the Communist Party is to be a Pariah, is to be someone who is no longer entitled to earn a living, no longer entitled to have a family—and we have in the Denver situation, for example, members of this very office standing up before the Federal Court there and saying that people who are communists and have families should have their families taken away from them so that they can go to jail for standing on [240] their constitutional rights, people who are Communists should have their families taken away from them because they are Communists—this is the purpose of this investigation, your Honor, and this purpose is to deprive people who may be connected with this organization in any way of the right of free speech, of the right of—

The Court: Mr. McTernan, the tenor of your argument is that the answers to this question will not incriminate these people, if I understand your argument correctly now.

Mr. McTernan: Well, your Honor, we tried to make this very clear this afternoon, and while I am not addressing myself now to the self-incrimination point, I would like to address myself to your Honor's question, because it does underlie much of our defense.

It is our position that people in this country have a right to belong to the Communist Party, and that the Communist Party is a lawful party. These gentlemen will echo this. But, on the other hand, what are they doing? This investigating agency is engaging in a private blacklist. Their

bosses are denouncing the Communist Party as a subversive and unlawful organization under the executive order, so that people cannot belong to the Communist Party and be employed by government. They are bringing indictments in New York against people solely on the basis that they belong to the Communist Party, and they are complaining, and they assert in their indictments, [241] that the Communist Party is an organization devoted to purposes which violate the Smith Act.

Now we say, your Honor, that the government should be on one side of this thing or the other, but in this kind of a proceeding it is attempting to be on both sides. It wants to be free in New York to indict people solely because they are members of the Communist Party, and it wants to be free here to expose people who are members of the Communist Party, with all of the social and economic limitations which that implies and carries with it, and blandly assert to the court, why there is nothing unlawful in being a member of the Communist Party, there is no statute which says the Communist Party is unlawful.

This is a completely inconsistent and intellectually dishonest position, your Honor. These people should take one position or the other. If the Communist Party is an organization which advocates or has for its purposes the things outlawed by the Smith Act, then membership in the Communist Party, as the Smith Act says, is a crime. And then any question which tends to connect a wit-

ness with that party would tend to incriminate him.

If, on the other hand, the Communist Party is not dedicated to those unlawful purposes, it is not an organization which violates the Smith Act, then membership in it is not a crime and then these questions concerning membership would [242] not tend to incriminate **them**.

But, your Honor, the government is taking half of one position and half of the other, and they are inconsistent, and they don't stand together.

Now, there is nothing inconsistent in what we are saying. What we are saying is that people have a right properly to belong to this organization, to engage in its activities, and they commit no crime.

We also say that when the government charges them with crime, as administrative findings of criminal activity, prosecutes people for membership in this organization, then there is a reasonable likelihood, if I may use the language of the court in the Counselman case and the Weisman case, the Cantor case, and numerous others, of penalty and danger to follow from giving any answer which would connect them with that.

Now we have gotten somewhat away from the point that I began on with reference to the political purpose of this grand jury investigation. The fact that it is an unlawful purpose, a purpose which invalidates the very act and which therefore renders their action here today a nullity, and which disables either the law-enforcement officers from

presenting to this court charges upon which they may be convicted and deprived of their liberty, and gives the court no jurisdiction to punish them or otherwise penalize them for not having answered the questions which they are charged with not having [243] answered.

Now part and parcel of that is also the equal protection point, which I have mentioned to your Honor earlier. This design on the part of the law-enforcement agency, we assert, is not simply an accidental, fortuitous circumstance that some people are prosecuted and other people are not. What we are saying, your Honor, is that there is a deliberate plan, an intentional drive on the part of the law-enforcement officers, the Department of Justice, to use the majesty of the law, the authority of this court, the grand jury, against one political party only, against one form of political expression only, and that only because the people happen to be holding their office and misusing it in this respect disagree with the political views and the organizational objectives of this party.

This is not a claim that the law is being enforced only partially, this is not a claim that you didn't prosecute or you didn't ask John Doe these questions, so why do you ask me, it is not that kind of situation at all, or that there are ten murderers who go free for every one that is charged with crime. That is not our point. Our point is that this is a systematic plan for breaking up the Communist Party by virtue of the device of grand jury hearings trying to indulge in the technique which

the Attorney General himself has announced, the technique of exposure, the technique of making Pariahs out of people, all to stifle political expression.

For these reasons, and for the reason stated in connection with the grand jury panel, we urge that these proceedings be dismissed.

In connection with our point of self-incrimination, your Honor, we wish to develop a record which is the same as the record which was developed some hours ago in connection with the motions at that time that your Honor direct these defendants, who were then witnesses, to answer. I don't want to repeat it if it is not necessary.

The Court: Your motion is to make a part of the record in connection with this proceeding all of the objections and grounds and reasons which you urged at that time?

Mr. McTernan: All of the evidence, your Honor, and all of the stipulations and all of the offers of proof.

The Court: They may be deemed to have been offered at this time with the same force and effect as if they were here repeated *haec verba*.

Mr. McTernan: Thank you.

Now I do not wish to argue extensively the cases on self-incrimination. I would like to say a few words about them in order to complete the record.

The Court: What are the cases?

Mr. McTernan: The cases are *Counselman v. Hitchcock*.

The Court: I think that has been developed enough. - [245]

Mr. McTernan: I didn't intend, when your Honor interrupted me, to discuss cases specifically. I simply wanted to give an overall summary with reference to them which I think will set the basic theme of our point on self-incrimination, and it will take me only a few minutes.

The Court: Is it any different than the basic theme which was developed and stated repeatedly this afternoon by Mr. Margolis and I think was several times stated by you?

Mr. McTernan: I think that the thing that has to be emphasized, your Honor, is the fact that the questions cannot be viewed standing alone, and this I think is the problem which we find in presenting it to your Honor and also in the argument.

The Court: I think you made that point this afternoon, and you offered in evidence the indictment in the Foster case and the other cases, and the general attitude which you said was expressed by the Attorney General. I understand your point.

Mr. McTernan: In other words, that the questions have to be considered in the light of the setting, which includes the New York indictment, the statements of the Attorney General, and——

The Court: I understand your point thoroughly, and I gave consideration to it and ruled upon it this afternoon.

Mr. McTernan: Yes. What we claim is the two-faced [246] position of the Department of Justice, in one case saying that membership is a crime and

in an other case saying it isn't a crime, simply because there is no statute specifically so providing.

Now in connection with the presentation of the defendants, apart from the motion to dismiss, I would like to call your Honor's attention to the fact that we urge that the asking of these questions is beyond the power of the grand jury and the command of the court to answer or the punishment of witnesses for not having answered is beyond the jurisdiction of the court because it infringes the rights of these people under the First Amendment of the Constitution of the United States.

The Court: I think you have developed that point. You have spent about 20 minutes on that First Amendment just a little while ago.

Mr. McTernan: I offered it, your Honor, in connection with a motion to dismiss.

I also want to be sure that there is no technical distinction between what I offer in support of a motion to dismiss and what I offer in connection with what might be properly called the merits of the matter, and I want to be sure that that point is considered.

The Court: It may be deemed that everything you have said in connection with the proceeding shall be taken in support [247] of whatever you may call a motion to dismiss or on the merits or for a continuance, or whatever else you may desire to designate it. They have all been considered as general objections to the proceedings and now as gen-

eral objections to the motion of counsel for the government.

Mr. McTernan: Yes.

Now in the course of that argument, your Honor, I made reference to a number of facts. We obviously at this hour of night will be unable to prove the facts which were asserted in my argument.

The Court: You made an offer of proof.

Mr. McTernan: The offer of proof which I made did not include those facts, and what I would like to do, in order to shorten the time, is to have the references to facts, such as the position and policy of the Attorney General, and so forth, stand also in connection with this motion.

The Court: That was also included in the offer of proof and I have just made an order that it may be deemed to be part of this record.

Mr. McTernan: Your Honor, I don't want to belabor the point. There is a difference. Some of the things which I said on the argument were not contained in the offer of proof made this afternoon, and may the statements which I made during the argument stand as offers of proof of those facts?

The Court: They may so stand, and are rejected. [248]

Mr. McTernan: May I be excused for just a moment to confer with counsel?

The Court: Surely.

(Conference between defense counsel.)

Mr. McTernan: Your Honor, may this record also include the statements which were made pri-

vately in chambers to you by each of the defendants at the time they were before you?

The Court: As private statements?

Mr. McTernan: Yes, your Honor.

The Court: You offer them now as private statements or as public statements?

Mr. McTernan: No, as private statements. We ask you to consider them in this connection in the same way that you considered them in chambers.

The Court: Very well. Those statements were private statements made to the court and will be deemed to be such, unless and until the defendants themselves desire to disclose them.

Mr. McTernan: Yes. [249]

Now I have just one simple point to make in closing.

* * * *

Mr. Goldscheine: It is a peculiar coincidence, if it is a coincidence, that of ten clients of Mr. McTernan's, the last five of which are asked questions that they don't know the answers to, namely, do you know Mr. Vincent Russo, and all five that are asked that question categorically say, "I refuse to answer on the ground that it may tend to incriminate me." That is a most unusual happening for five people picked at random and asked the same question, all five of whom are advised by the same lawyer. And they talk about a mousetrap.

The right to political views has been discussed here at length, and yet the political views of none of these witnesses have been asked by the grand jury. No witness before that grand jury has been asked

his political views. And yet the courts have held that there isn't any reason why you can't ask the political views of a witness before the grand jury in any kind of an investigation that it is pertinent to.

Why, may it please the court, a case right in point on that question, and in point of time as well, is the case of *Abrams v. United States* in 64 F. (2d).

The Court: I do not think that they have been asked their political views.

Mr. Goldschein: That is right.

The Court: So I do not care to hear any authority on that subject.

Mr. Goldschein: I was only relating it for the coincidence in connection with it.

The Court: I see.

Mr. Goldschein: The question in that case was *Thomas E. Dewey*, and the question that he asked the witness was, "Are you a Democrat captain in some particular ward or district," and the witness refused to answer, and the question went up, and they held that the question was a proper one.

I merely cite that because of the coincidence in connection with the particular question on politics.

I have examined the cases at great length over some time and I know of no court at any time that has gone further to protect the constitutional rights of the witnesses who appeared [252] before this grand jury than this court has done. I know of no court, I know of no district, where the court categorically took each witness in his chambers to let that witness tell him privately, out of the hearing of either counsel, what that statement is, what the

answer is that would tend to incriminate him for the violation of a Federal offense, and in this court tonight ten witnesses were categorically, one after the other, taken in chambers.

They talk about constitutional rights. At no time did they ever talk of the rights of the grand jury whose duty it is to protect the community against law violators, and the right of the grand jury to make inquisitorial investigations.

Now I think during the course of the evening we have expressed our views. I think the right of the Attorney General to order these investigations is a proper one, the right to enforce the laws of this country is a duty, and we expect to carry on just as we have in the past.

The Court: Is it your position that this is a civil contempt or a criminal contempt?

Mr. Goldschein: The contempt will be determined by the action of the court. The plea of the government is that these people be confined in jail until they answer the questions before the grand jury.

The Court: I understand your position.

Mr. Goldschein: It is civil contempt. [253]

Mr. McTernan: Your Honor, we can't agree with the position of counsel on that subject. Again we speak at a great disadvantage. It wasn't until somewhere around 11:00 o'clock tonight, and it is only about an hour ago, that we knew that the government was going to ask this court to commit these people, who were routed out of bed by these subpoenas this morning.

The Court: Counsel, if you have a new point let

us get to the new point, but let us not keep repeating routing out of bed, what you have learned today, and that you have worked hard. We have all worked hard, and we realize that you are entitled to have an opportunity to represent your clients and to present your points. This court has taxed its strength and its time as much as anyone else, but please do not repeat yourself. If you have a new point to argue, will you argue your new point.

* * * *

Mr. McTernan: Now either these people are shooting towards a crime connected with the membership in the Communist Party, or they are just engaging in a cat-and-mouse game, they are just playing around with this sort of thing, your Honor, and misusing the processes of this court.

The Court: Counsel, have you a new point? You made all those points before.

Mr. McTernan: I think this is a new point.

The Court: That is not new. You have made that statement before. If you have a new point, let us hear it.

Mr. McTernan: I have a point, but if your Honor doesn't want me to finish it——

The Court: What is your point, without repetition of all of the things or various things you have said heretofore?

* * * *

The Court: Very well. Is everybody through offering points and suggestions now? (No response.)

Are you ready for the ruling?

Mr. Goldschein: Ready for the ruling, sir.

Mr. Margolis: Yes, your Honor.

The Court: As your name is called, will you please come forward and stand back of the bar here.

Mrs. Noble.

Mr. Bissey.

Mr. Dobbs.

Mrs. Smith.

Mrs. Sherman.

Mr. Bock.

Mr. Kasinowitz.

Mrs. Forest.

Mr. Alexander.

And Mr. Steinberg.

Mrs. Noble, it is the judgment of the court that you are found guilty of contempt of this court for refusal to obey a lawful order of the court, to wit, a direction to you to answer three questions which were put to you before the grand jury. Those three questions were: Do you know the names of the county officers of the Los Angeles County Communist Party? Do you know the table of organization and duties of the Los Angeles County Communist Party? And do you know Ned Sparks?

It is the judgment and sentence of the court that you be committed to the custody of the Attorney General, acting through the United States Marshal, until such time as you shall answer these questions, and you shall forthwith be committed.

Mr. Bissey, it is the judgment of the court that you are found guilty of contempt of this court for failure to answer a lawful order, namely, an order

heretofore made directing you to answer two questions before the grand jury, to wit: Do you know the names of the county officers of the Los Angeles County Communist Party? Do you know the table of organization [259] and duties of the Los Angeles County Communist Party?

It is the sentence of the court on that judgment that you be committed to the custody of the Attorney General until such time as you shall answer those questions.

Mr. Dobbs, it is the judgment of the court that you are found guilty of contempt of this court for failure to answer a lawful order thereof, to wit, the order of the court heretofore made upon you to answer four questions put to you by the attorneys for the government before the grand jury. Those four questions are: Do you know the names of the county officers of the Los Angeles County Communist Party? Do you know the table of organization and duties of the Los Angeles County Communist Party? Do you know Ned Sparks? And for whom are you an organizer?

It is the sentence of this court on that judgment that you be committed to the custody of the Attorney General until you shall answer those questions, and you will stand forthwith committed.

Mrs. Smith, it is the judgment of this court that you are found guilty of contempt of this court for failure to obey a lawful order thereof, to wit, the order of this court heretofore made directing you to answer two questions before the grand jury, namely: Do you know the names of the county offi-

cers of the Los Angeles County Communist Party? Do you know Ned Sparks? [260]

For this contempt it is the sentence of the court on that judgment that you be committed to the custody of the Attorney General and forthwith committed to the custody of the marshal until you shall answer those questions.

Mrs. Sherman, it is the judgment of the court that you are guilty of contempt for failure and refusal to obey a lawful order of this court, to wit, an order directed to you to answer four questions before the grand jury, those questions being: Do you know the names of the county officers of the Los Angeles County Communist Party? Do you know the table of organization and duties of the Los Angeles County Communist Party? Do you know Ned Sparks? And by whom are you employed?

It is the sentence of the court on that judgment that you stand committed to the custody of the Attorney General until you shall answer those questions, and you will be forthwith and are now committed.

Mr. Bock, it is the judgment of the court that you are guilty of contempt of the processes of this court for your refusal and failure to obey a lawful order thereof, to wit, the order directed to you to answer three questions put to you before the grand jury, to wit: Do you know the names of the county officers of the Los Angeles County Communist Party? Do you know the table of organization and duties of the Los Angeles County Communist Party? For whom are you an organizer? [261]

For this contempt it is the sentence of the court on that judgment that you shall stand forthwith committed to the custody of the Attorney General until you shall answer those questions. The defendant will stand committed in the custody of the marshal.

Mr. Kasinowitz, it is the judgment of the court that you are found guilty of a contempt of this court for failure and refusal to obey a lawful order of this court, to wit, an order of this court directed to you to answer two questions pending before the grand jury, which questions are: Do you know the names of the county officers of the Los Angeles County Communist Party? Do you know the table of organization and duties of the Los Angeles County Communist Party?

It is the sentence of the court on that judgment that you stand committed to the custody of the Attorney General until you shall answer those questions, and you shall be forthwith and are committed.

Mrs. Forest, it is the judgment of the court that you are guilty of contempt of the processes of this court for failure and refusal to obey a lawful order of this court, to wit, an order of this court directing you to answer two questions before the grand jury, namely: Do you know the names of the county officers of the Los Angeles County Communist Party? Do you know the table of organization and duties of the Los Angeles County Communist Party? [262]

It is the sentence of the court on that judgment

that you stand forthwith committed to the custody of the Attorney General until you shall answer those questions. You will stand committed.

Mr. Alexander, it is the judgment of this court that you are guilty of a contempt thereof in that you have refused to obey a lawful order of this court, namely, an order directing you to answer two questions before the grand jury, those questions being: Do you know the names of the county officers of the Los Angeles County Communist Party? Do you know the table of organization and duties of the Los Angeles County Communist Party?

It is the sentence of the court on that judgment that you stand committed to the custody of the Attorney General until you shall answer those questions and you will be forthwith committed.

Mr. Steinberg, it is the judgment of the court that you are guilty of a contempt of this court in that you have failed and refused to obey a lawful order of this court, namely, an order directing you to answer two questions before the grand jury, which questions are: Do you know the names of the county officers of the Los Angeles County Communist Party? Do you know the table of organization and duties of the Los Angeles County Communist Party?

It is the sentence of the court on that judgment that [263] you stand committed to the custody of the Attorney General until you shall answer those questions, and will stand forthwith committed.

Mr. McTernan: Your Honor, may I direct two matters to your attention? Two of the ladies whom you have ordered committed are mothers of chil-

dren. Mrs. Forest is the mother of a 4-year-old child. Her husband is working outside of Los Angeles a considerable distance, and she needs time to make arrangements for the care of that child.

Mrs. Sherman is the mother of two children, one 12 years old and the other 4 years old. Her husband is living with her, but has to work in order to meet the family budget, and she needs time also to arrange for her children's care.

The Court: Is there any objection to the stay of execution to Mrs. Sherman and Mrs. Forest for 24 hours?

Mr. Goldscheim: None, your Honor.

The Court: Very well. The execution of the sentence as to Mrs. Forest and Mrs. Sherman will be stayed until Wednesday, October 27th, at 12:00 o'clock noon. The other defendants will stand committed and forthwith taken into custody of the marshal. [264]

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REPORTER'S TRANSCRIPT OF WITNESSES'
STATEMENTS TO COURT IN CHAMBERS

Los Angeles, California

October 25, 1948

STATEMENT OF WITNESS MARGARET
IRIS NOBLE

(The following proceedings were had in chambers, as follows:)

The Court: The record will show that we have recessed to chambers and that there is present Mr. Hayden, the bailiff, Mr. Horn, the Clerk, and

the court reporter, Mr. Wahlberg, and Mrs. Noble, the witness.

Now do you desire to make a statement?

Mrs. Noble: Yes. I want to make a statement that the reasons I refuse to answer the questions in the grand jury room were because I felt that the answer to those questions would tend to link me up with the Communist Party, which is a party which the Attorney General has declared to be a party of force and violence.

The Court: Is there any other statement that you wish to make? If so, I will hear it. Is that the only reason you have?

Mrs. Noble: Yes.

The Court: That is not sufficient. It is no explanation. We will resume in open court. [3]

* * * *

STATEMENT OF WESLEY BISSEY

(The following proceedings were had in chambers, as follows:)

The Court: The record will show that Mr. Bissey, the witness, is here, the Clerk, Mr. Horn, Mr. Wahlberg, the reporter, and Mr. Hayden, the bailiff.

Mr. Bissey, you heard your counsel's statement that you desire to make a statement privately to the court in support of your contention that the answer to these questions might incriminate you?

Mr. Bissey: Yes, sir.

The Court: I will hear now the statement you desire to make.

Mr. Bissey: Well, your Honor, I feel that answering these questions might tend to link me with an organization which the government seems to believe is committed to the violence and overthrow of our existing government.

The Court: Those are the grounds which your counsel has urged. Do you have some other ground other than that which has been urged in open court here, I mean something that is personal to you? If you do, I will hear it, something you would not care to state openly.

Mr. Bissey: Well, your Honor, I agree wholeheartedly with the position of my counsel in this respect. It appears to me, on the basis of things that have happened in the recent [4] past, that it is quite apparent that these questions are for the purpose of linking me with an organization that the government's position seems to think is committed to force and violence. This being true, I personally believe that answering these questions would tend to incriminate me, excepting the question in relation to the one gentleman, whose name I don't recall just now.

The Court: Mr. Russo?

Mr. Bissey: Mr. Russo, as was pointed out.

The Court: You are willing to answer that question?

Mr. Bissey: Well, it was only in the development of the discussion in your courtroom that I learned that Mr. Russo was sitting at the table there.

The Court: Do you have any other statement to make?

Mr. Bissey: No, sir.

The Court: Very well. We will resume in open court.

* * * *

STATEMENT OF WITNESS BEN DOBBS

(The following proceedings were had in chambers, as follows:)

The Court: Let the record show that there are present the witness, Mr. Dobbs; Mr. Horn, the Clerk; Mr. Wahlberg, the reporter, and Mr. Hayden, the Bailiff.

Mr. Dobbs, in the statement you made to your counsel I [5] understand that you desire to make a statement to the court at this time as to any additional reasons other than those assigned by your counsel as to why the answer to the questions might incriminate you, and I have asked you in here for that purpose in order to give you that opportunity.

Mr. Dobbs: I have no additional reasons. I would like to make a statement, sir.

The Court: Very well.

Mr. Dobbs: I can't think of any additional reasons but I would like to make a statement.

The Court: Yes?

Mr. Dobbs: I refuse to answer the questions on the ground that it would incriminate me because of the position of the government that the Communist Party is advocating the overthrow of the United States government by force and violence. To answer the questions, the evidence might link me to that organization and at the same time link

me knowingly to an organization that the government claims advocates the overthrow by force and violence, especially in terms of answering what organization I organize for.

The Court: You do not care to elaborate on that statement?

Mr. Dobbs: No, sir.

The Court: Now is your opportunity to make any private statement to me that you wish to make which you would not [6] care to have other persons hear.

Mr. Dobbs: No, sir. I think it answers the same question, that is, I have nothing to say to the court that I wouldn't say elsewhere.

The Court: No other personal reasons?

Mr. Dobbs: No, sir.

The Court: Very well.

* * * *

STATEMENT OF WITNESS DELPHINE MURPHY SMITH

(The following proceedings were had in chambers, as follows:)

The Court: The record will show that the witness Mrs. Smith is here, with Mr. Hayden, the bailiff; Mr. Horn, the Clerk, and Mr. Wahlberg, the reporter.

Mrs. Smith, we have adjourned the court to chambers here in order that you may make any statement that you desire privately to the court in justification of your excuse or in explanation of your refusal to answer the questions.

Mrs. Smith: Yes.

The Court: And I am now affording you that opportunity. Do you wish to make a statement?

Mrs. Smith: Well, if I were to answer that question about who I know, etc., it would tend to put me in the position of possibly being connected with an organization that the [7] United States government, officers of the United States government, claims or seems to think advocates the overthrow of the government by force and violence. That was why I refused to answer.

The Court: Do you have any other statement to make? If you do, now is the opportunity, I mean any statement of reasons which are purely personal to you?

Mrs. Smith: No, I don't believe so.

The Court: This statement is to the court in private.

Mrs. Smith: I don't believe so.

The Court: You do not have any other statement to offer?

Mrs. Smith: No.

The Court: Very well. We will reconvene in the courtroom.

* * * *

STATEMENT OF WITNESS MIRIAM
BROOKS SHERMAN

(The following proceedings were had in chambers, as follows:)

The Court: This witness is——

Mrs. Sherman: Sherman, Mrs. Sherman.

The Court: Let the record show that there is

present Mrs. Sherman, the witness; Mr. Horn, the Clerk; Mr. Wahlberg, the reporter, and Mr. Hayden, the bailiff. [8]

Mrs. Sherman, we have adjourned to chambers here in order that you may make any statement that you desire in addition to that which your counsel has made and which has been urged in open court which you may wish the court to know in connection with your claim that the answer to the questions propounded would incriminate you, and I am now ready to hear any statement you desire to make.

Mrs. Sherman: I have information that Ned Sparks is an officer of the Communist Party. I also understand that the Federal government is accusing the Communist Party of advocating force and violence, and I feel that any connection that I may show in answering these questions may be a step in a chain which may prove, according to the government's contention, that I have connections with this organization which they claim advocates force and violence.

The Court: Well, now, in addition to those reasons is there any personal reason which you wish to state to me at this time which you do not wish to state in open court or otherwise?

Mrs. Sherman: No, your Honor.

The Court: There are none?

Mrs. Sherman: There are none.

The Court: Do you have any other statement to make?

Mrs. Sherman: No, I have not.

The Court: Very well. We will reconvene in the courtroom. [9]

* * * *

STATEMENT OF WITNESS PHILIP BOCK

(The following proceedings were had in chambers, as follows:)

The Court: The record will show that there is present the witness, Mr. Bock; Mr. Horn, the Clerk; Mr. Wahlberg, the reporter, and Mr. Hayden, the bailiff.

Mr. Bock, we have adjourned here in order to give you a chance to make any statement which you desire to make in addition to that which your counsel has made in open court which you think may aid the court in determining whether or not your refusal to answer the questions might tend to incriminate you. Do you have any statement to make?

Mr. Bock: Yes, I do.

The Court: Very well.

Mr. Bock: The questions seem to me to lead to my knowledge and possible connection with either leaders or members of the Communist Party, and I am aware of the fact that there is a Federal trial pending on the subject of whether or not the Communist Party advocates——

The Court: Where?

Mr. Bock: In the Federal District Court of the Southern District of New York. [10]

The Court: That is the Foster case and the other cases that have been mentioned?

Mr. Bock: Yes.

The Court: Yes?

Mr. Bock: I am aware of that case.

The Court: Are you a party to it?

Mr. Bock: No, sir.

The Court: Have you been named in connection with it?

Mr. Bock: No, sir. But I am aware that it seeks to establish that the Communist Party teaches the overthrow of the government by force and violence, and that if I knowingly had any membership in or connection with such an organization and followed the line, answered the line of questions which showed knowledge, that I might incriminate myself.

The Court: Do you have any other statement to make?

Mr. Bock: No, sir.

The Court: Are there any purely personal reasons other than those which you have stated which you think I should know which might tend to incriminate you in connection with the answers to these questions?

Mr. Bock: Well, the most personal thing that concerns me is my own freedom and I feel that there is a threat to it implied in answering those questions.

The Court: I mean other than that. Frequently people find themselves in the position where they know things that [11] nobody else knows. Do you wish to make a statement here?

Mr. Bock: Anything I may or may not know, I

feel that any disclosure to those questions might tend to incriminate me.

The Court: Then you do not have any other statements to make?

Mr. Bock: No, sir.

The Court: Very well. We will reconvene in the courtroom.

* * * *

STATEMENT OF WITNESS DOROTHY BASKIN FOREST

(The following proceedings were had in chambers, as follows:)

The Court: You are Mrs. Forest?

Mrs. Forest: That is right.

The Court: The record will show the presence of the bailiff, Mr. Hayden; the clerk, Mr. Horn, and the reporter, Mr. Wahlberg, as well as myself.

Mrs. Forest, we have reconvened in here in order that you may make a statement to me privately, if you desire, of any additional grounds or reasons why you think that the answers to the questions asked may incriminate you.

Mrs. Forest: Yes, I understand that.

The Court: Very well. Do you have a statement that you [12] wish to make to me?

Mrs. Forest: Yes, I do.

The reason I refuse to answer the questions put to me before the grand jury was because I thought the answers might tend to tie me up with the Communist Party or an officer of the Communist Party.

I have information that Mr. Ned Sparks is an officer.

The Court: I do not think they asked you if Mr. Ned Sparks was a member. That was not read by the reporter.

Mrs. Forest: I don't remember at the moment. However, I do understand that the United States Government now contends that the Communist Party is an organization that advocates the overthrow of the government by force and violence, and I felt that I would not knowingly want to admit membership, want to admit knowing members in an organization that advocates the overthrow of the government.

The Court: They did not ask you if you were a member.

Mrs. Forest: Well, however, they did, in my opinion, attempt to tie me up with the Communist Party by asking questions pertaining to the Communist Party.

The Court: Do you have any other reason? If you do, if there are any private reasons which you wish to state to me privately here now, this is your opportunity.

Mrs. Forest: This is my personal statement.

The Court: Other than what you have stated you have—— [13]

Mrs. Forest: No additional statement, your Honor.

The Court: ——no additional personal or private reason?

Mrs. Forest: Nothing additional.

The Court: Very well. We will reconvene in the courtroom.

* * * *

STATEMENT OF WITNESS SAMUEL HARRY KASINOWITZ

(The following proceedings were had in chambers, as follows:)

The Court: The record will show Mr. Hayden, the bailiff; the clerk, Mr. Horn; the reporter, Mr. Wahlberg; myself and the witness, Mr. Kasinowitz.

Mr. Kasinowitz, this opportunity has been accorded to you to make any statement in addition to that made by your counsel or other than that made by your counsel in open court which you feel may justify you in refusing to answer the questions on the ground they might incriminate you. Now, do you wish to make a statement?

Mr. Kasinowitz: Yes, sir.

Well, sir, I took that position on the basis of the explanation which the government attorney made, and that was that he said if I felt that by answering the questions he asked me I would tend to place myself in—I forget his exact language.

The Court: Commit an offense against the Federal laws?

Mr. Kasinowitz: Place me in jeopardy or something, that I would have the right to refuse.

Well, I feel that on the basis of the knowledge that I have, first, that the Attorney General has ruled that the Communist Party is a subversive

organization which has as its intent to overthrow the government of the United States by force; secondly, on the knowledge that I have through the public press that there were indictments handed down in New York against officials of the Communist Party.

The Court: You are referring now to the Foster and other indictments that were referred to by counsel?

Mr. Kasinowitz: Yes, sir.

The Court: Yes?

Mr. Kasinowitz: And that had I answered the questions that the government attorney put to me I would tend to show that I was in association, or might be in association, and thus might place myself——

The Court: With whom?

Mr. Kasinowitz: With these officials, the table of organization, or through the knowledge that I might have of the Communist Party.

The Court: The table of organization of the Los Angeles County Communist Party?

Mr. Kasinowitz: The question is, do you know the table. [15]

The Court: The names of the officers of the Los Angeles County Communist Party and the table of organization of the Los Angeles County Communist Party?

Mr. Kasinowitz: Yes, sir. In other words, on the basis of his explanation of the knowledge—I am not a lawyer; I don't know the law—but on the basis of the knowledge of what is transpiring, as

far as I have been able to determine, I felt, and I feel, I am within his definition of self-incrimination.

The Court: Do you care to state which Federal statute you think you violated?

Mr. Kasinowitz: Well, no. I don't say I violated a Federal statute.

The Court: You think it might tend to show you violated one?

Mr. Kasinowitz: On the basis of the ruling of the Attorney General, that is, the subversive list, the so-called subversive list, and, secondly, the knowledge that I had through the public press of the indictment against twelve people who are supposed to be the leaders of the Communist Party, and from the public press the indictments propounded on the basis that they were members of the Communist Party, and as such tended to conspire, or whatever the case might be, to overthrow the government by force and violence. You understand, I am not an attorney. [16]

The Court: I understand.

You understand that you are appearing only as a witness and that he stated to you that it was not with the idea that you yourself should be investigated or proceeded against?

Mr. Kasinowitz: I understood his explanation.

The Court: I see. Do you have any other statement?

Mr. Kasinowitz: No, sir.

The Court: Is there any other purely personal

reason which you would like to state to me privately other than this explanation?

Mr. Kasinowitz: Well, I don't know whether this has any legality or weight before the court, but my personal interpretation, other than legal, of self-incrimination, or whatever the word is, by perhaps showing, by answering the questions in a certain way that I have such knowledge of the Communist Party, well, it would place me in jeopardy as far as the ability to earn a living is concerned.

The Court: You understand the grand jury proceedings are secret?

Mr. Kasinowitz: I understand that until I got here this morning and we had to rush through a barrage of newspaper photographers.

The Court: I mean what goes on inside the grand jury room.

Mr. Kasinowitz: Oh, yes, I understand that. But I [17] find, for example, that in tomorrow morning's edition of the Times I have got my face plastered all over the thing, and certainly that is not going to make my economic position any better.

The Court: Sometimes it may be unfortunate that those things happen but that is not a legal reason.

Mr. Kasinowitz: I say I don't know how much weight that will have.

The Court: That is not a legal reason. But occasionally people have some things which privately they know that other people do not and which they do not sometimes even wish to tell their

lawyers but which they will tell a judge which will convince him. Do you have anything of that nature at all?

Mr. Kasinowitz: No, sir.

The Court: Do you have anything else to say?

Mr. Kasinowitz: No, sir.

The Court: Very well. We will resume in the courtroom.

* * * *

STATEMENT OF WITNESS FRANK
EDWARD ALEXANDER

(The following proceedings were had in chambers, as follows:)

The Court: The record will show that the reporter, Mr. Wahlberg, is present; Mr. Hayden, the bailiff, and Mr. Horn, [18] the clerk, and myself.

Mr. Alexander, we have adjourned in here in order that you might make any statement to me in addition to that already offered in open court in substantiation of your position that your answer to these questions might tend to incriminate you.

Do you want to make such a statement now?

Mr. Alexander: Yes, I would.

In line with the question of the government officers that was asked of me, I feel that this would incriminate me on the ground that it would associate me with the—with these leaders, officers, and that since the attorney Tom Clark is attempting to prove that the Communist Party advocates the overthrow of the United States government, therefore I feel that this would tend to prove that I

knowingly am a member of the Communist Party.

The Court: And the other question?

Mr. Alexander: The same thing.

The Court: The same thing?

Mr. Alexander: Yes.

The Court: Now do you have any other reason such as purely personal reasons which you would like to state to me privately other than those that have been stated in open court?

Mr. Alexander: Nothing that I really wouldn't want to [19] state in open court.

The Court: Do you have any other grounds at all?

Mr. Alexander: No, sir.

The Court: Very well. We will reconvene in the courtroom.

* * * *

STATEMENT OF WITNESS HENRY STEINBERG

(The following proceedings were had in chambers, as follows:)

The Court: The record will show the presence of Mr. Hayden, the bailiff; Mr. Horn, the Clerk; Mr. Wahlberg, the reporter, and myself.

Mr. Steinberg, I have adjourned to chambers here in order that you might make any statement in addition to that which has been heretofore offered by your counsel, or other and different than that, in connection with your refusal to answer the questions on the ground that it might incriminate you.

Do you wish to make such a statement?

Mr. Steinberg: Yes, sir.

The reason I am not answering those questions, your Honor, is that this will tend to knowingly identify me with an organization that the government contends would overthrow the government by force and violence, and on that basis to [20] incriminate myself on those lines would be self-incriminatory.

The Court: Do you have any other statement to make?

Mr. Steinberg: No, sir.

The Court: Is there any personal reason, any purely personal reason other than that, which you wish to communicate to me and do not wish to communicate to anyone else?

Mr. Steinberg: No, sir.

The Court: Very well. We will reconvene in the courtroom. [21]

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

October 26, 1948—10:00 o'clock a.m.

The Court: Ex parte matters?

The Clerk: Yes, your Honor. Mr. McTernan has a matter.

Mr. McTernan: May it please the court, in connection with the matters that were determined last night, the 10 adjudications in attempt and commitment to the county jail, as your Honor knows we filed a notice of appeal with the clerk last night and advised the court that we wished to make a motion for bail.

The Court: I will have to defer that matter until the conclusion of my regular calendar and the impanelment of the jury in the trial. I will hear it when I finish the other matters that are on the calendar.

I imagine you have some question of law to urge in connection with it?

Mr. McTernan: We have, your Honor.

The Court: Very well.

* * * *

The Court: Mr. McTernan?

Mr. McTernan: If the court please, I appear before you this morning to make a motion for the setting of bail in the cases of the ten individuals who last night were adjudged in contempt and committed to the custody of the Attorney General until such time as they answer the questions propounded to them

before the grand jury. Because of the fact that I am not yet sure of the nature of the contempt proceeding which was conducted last night, whether it was criminal or civil in nature, I would like to make my motion in the alternative, that the court fix bail pending appeal, if that is the proper procedure, assuming that the contempt proceedings last night were criminal in nature; or, in the alternative, that the court stay execution of its judgment in the event that the proceedings last night were civil in nature.

As you know, a notice of appeal has been filed with the clerk. I don't want to take the time of the court to argue on this motion questions which were argued at length to you yesterday. I wish to point out, as I understand the question now, if we are moving for bail, that the court—

The Court: Or for a stay. The questions are both the same, whether or not there is a substantial question.

Mr. McTernan: Yes, your Honor.

I submit to your Honor that while government counsel will doubtless contend—

The Court: Excuse me, counsel.

Mr. Bailiff, will you get the Penfield case? I have forgotten the title of it. I think it is Securities and Exchange Commission v. Penfield, 322 or 323.

Mr. McTernan: Do you wish me to wait until you get it?

The Court: I want to get that case because I think it may settle for you the question as to whether or not it is a civil or criminal appeal or proceeding. You can go ahead in the meantime on the matter as to whether there is a substantial question.

Mr. McTernan: Yes.

I am sure it will be urged to you when I am through that this is an extremely grave and serious matter, that the proceedings and functioning of the grand jury were interfered with, and that the full process of the court should be used to prevent that.

Now against that I ask you to weigh this, that these people conceive that they have rights, that these rights are being violated, and they are entitled to a judicial determination as to the propriety and correctness of their position, and that the only way that they can have such a determination is to make an issue which can be determined, and they have done so by respectfully—and I think that the personal appearances of these people before your Honor last night must convince you that they were respectfully taking their position—that they intended no lawlessness in what they were doing, they were seriously of the opinion that they had rights which in due course would be vindicated, and we are now asking that the proper procedure be observed so that their right to have their positions vindicated or determined against them, as the outcome may be, will be an effective one and a real one, and that they will not be confined during the period when the questions are as yet undetermined.

We submit that the questions which we are to raise on appeal are of substance, are of importance, and should be determined and should be determined in a way which permits these people to have their liberty until the determination is reached.

I don't want to argue again the self-incrimination problem, your Honor, but I think it turns on the

difference between the Counselman case, on the one hand, and the Mason case on the other.

The Court: Has counsel taken into consideration the whole line of cases concerning officers of corporations, the case of United States v. White, in 322 U. S., decided in 1943, where officers of a labor union, an unincorporated organization, were subpoenaed before the grand jury to produce books and records, and they refused to do so, and the court sustained the judgment for contempt against them?

Mr. McTernan: I am familiar with that.

The Court: There they likewise claimed the privilege against self-incrimination, and so forth, and attempted to make a distinction between officers of an unincorporated association, such as a union, and urging there again the rights of assembly and organization, liberties of the First Amendment, and a corporation, that a corporation was a business instrumentality. But the court held that there was actually no distinction.

Mr. McTernan: Yes, I am familiar with those cases, your Honor, but I submit to you that they have no application to the issues which are presented here.

There is no showing in the examination before the grand jury, and there is no showing in any of the proceedings before your Honor, that any of these people were either members of or officers of or connected with the Communist Party, which is apparently the subject of the investigation.

These people are claiming the privilege for themselves based upon a possible tie-in with that organization, which the Attorney General has held and is prosecuting as per se an unlawful organization. They

are seeking protection against the incrimination which comes from answering questions which might tie them in with that organization in such a way as to subject them to the risk of prosecution.

They are not saying that they don't have to submit or produce the books and records of an organization because this would incriminate them; they are not saying that they don't have to answer questions concerning their organizational connection with the Communist Party, because the privilege of the organization is available to them: they are saying that answers to these questions would connect them with an organization and incriminate them, subject them to a risk of prosecution, because of the position which the Attorney General has taken.

I submit to your Honor that the White case and those other cases do not apply to the facts that are before you here in this matter.

Against I submit that the question before your Honor now is not whether you agree with our position or not, the question is whether there is a reasonable possibility that your Honor may be wrong, that there may be a reversal upon appeal.

The Court: Pardon me. Is that lady a shorthand reporter? Are you taking shorthand notes?

A Spectator: No, I am not.

The Court: Very well. I just want to call attention to the fact that there is only one official reporter and only one permitted.

Mr. McTernan: I understand that to be the rule, your Honor.

The question here is whether there is a reasonable likelihood of reversal, of change, that your Honor

may be wrong. We submit that there is a substantial question because of particularly the reliance of the government—and I believe the reliance of the court in reaching its conclusion yesterday—upon the Mason case which we submit to your Honor has been whittled away until it is nothing, and that the correct rule is the rule in the Counselman case and in the Mason case, and that we can convince the higher court that that is the correct rule and that it does apply to the facts of this case.

I spoke at length last night concerning what we consider to be the invalidity by its very nature of this grand jury inquiry because of the invasion of the rights guaranteed by the First Amendment. I have nothing to add to this point. But this too is a point which your Honor knows is in litigation in various courts of the United States now. It is a real question. It is a question which has not been finally determined, and it is a question which these appellants should have an opportunity to raise because of the way it hinges upon them and results in their incarceration.

We wish to urge further on appeal that these appellants were denied due process of law by the manner in which the proceedings were conducted, with particular reference to your Honor's denial of a continuance, especially your denial of a continuance on the contempt proceeding itself, which as your Honor will recall began about 10:45 p.m., following a long and lengthy day, in which, as we pointed out to you, counsel were not only tired out but had never had an opportunity reasonably to prepare for the serious charges which were brought and had no op-

portunity until that moment to know what objectives the government sought.

We submit that to be required to go to trial under circumstances such as that, when up until the eleventh hour, until the very beginning of the trial, if you will, there was no opportunity for the appellants to know what it was the government sought, denies them what has been described by the Supreme Court as the rudimentary requirements of fair play. The line of cases which includes the two Morgan cases are the cases which I specifically refer to.

We also wish to raise on appeal, your Honor, the improper selection of the grand jury and the availability of this challenge to persons in the position of these defendants. We submit to your Honor that this too is an open question and that this question has not been finally determined, and that there is no definitive nor authoritative statement of the law on the subject. There are cases pointing both ways. And if our contention is correct, as we read such cases as the Theil case, and the others—the names of which I don't recall now, but they were referred to here yesterday—

The Court: The Ballard case.

Mr. McTernan: Yes.

The Court: The Theil case.

Mr. McTernan: Yes.

These considerations go to the actual existence of the grand jury, to its power to act in any respect, and if it did not have the power to act in any respect then it did not have the power to ask these witnesses these questions and the power to compel them to

answer these questions was lacking in the court, and therefore the power to punish was lacking.

Now these basically are the questions which we will raise on appeal. Again I state to your Honor the question here is not whether they are questions which your Honor would decide in our favor—your Honor has already decided all of these against us—the question is whether they are issues of substance, whether we raise a reasonable appeal.

I submit to you that the law on every one of these questions, if it does not point definitely in our direction so that your Honor was wrong on the cases as the law now stands, there is at least an open question on each of these matters and there is room for the intervention of an appellate court, and we therefore do raise questions of substance and we are, I believe, your Honor, in fairness entitled to either bail or a stay so that this right of appeal, which we have under the criminal rules, may be a real right, may be an effective right.

It would do little for these appellants if, having this right of appeal and having the substantial questions, they must remain in custody while the matter is being determined months hence.

After all, it is, as I understand it, fairly customary practice for the district courts to release persons who are convicted of serious crimes on bail pending appeal until the issues are determined. These people are certainly not in a position of common criminals, they have committed no offense involving moral turpitude, they have raised in the only way that they know how serious legal questions going to basic constitutional rights. There is nothing more fundamental

in our system than the privilege against self-incrimination and the rights under the First Amendment. All we are asking is an opportunity, really and effectively, to have these rights determined without being required to stay behind bars as the price of getting that determination.

Mr. Goldschein: May it please the court, this matter was argued quite at length, and all the questions raised by counsel for the witnesses this morning are repetition of yesterday, and I don't intend to take up the time of the court in answering that argument unless there is something specifically that the court wants to hear me on.

The Court: I think the court has to make a determination whether or not it is a civil contempt or a criminal contempt.

Under the Penfield case I do not know but what it is a civil contempt. That is reported in 330 U. S. 585. In that case the Securities & Exchange Commission issued a subpoena duces tecum under the authority of their law. It was disobeyed. They sought an order of court directing the defendant to produce the books.

After hearing the court made an order directing the defendant to produce the books. The defendant did not produce the books.

He appeared before the court, pleaded guilty to disobedience to the court's order. The court fined him \$50 and he paid it.

But the Securities and Exchange Commission appealed to the Supreme Court, and there the court held that the contempt was a suit in a civil nature and that the court was wrong in imposing any punitive measure upon the defendant and that the court

had the power only to use the coercive powers of the court, to-wit, to commit the defendant until he should produce the books.

Here in this case the witnesses were subpoenaed before the grand jury. They declined to answer the questions. The question was certified to the court. The court then made an order upon the defendants directing them to answer the questions. The analogy to the order of the court against the subpoenaed person in the Penfield case to produce the books. He refused to produce the books. They refused to answer the question. The court therefore used the coercive powers of the court and committed them to jail until they should answer the question.

For that reason, and I will so hold that it is a civil contempt, I will treat your notice of appeal here and your motion as a motion for stay of execution rather than for the fixing of bail.

Mr. Goldschein: That matter was discussed quite in detail in the United Mine Workers case.

The Court: Yes, which was decided the same day as the Penfield case. I think the Penfield case may have delayed the decision in the United Mine Workers case a little while trying to reconcile the two decisions. But in any event the Supreme Court reconciled them to their satisfaction, if not to others, and it is the law and I must follow it.

So I hold that it is a civil contempt proceeding and treat this as a motion for a stay of execution.

Coming now to the question as to whether or not the motion for the stay of execution should be granted, it turns on the question as to whether or not there is a substantial question raised. As counsel indicated,

the points on which they expect to rely are those which were set forth in the motion yesterday set forth in writing and filed to challenge the grand jury and to quash the subpoenas.

The first point is as to the composition of the grand jury. I do not think that that is a substantial question. In fact, I think it is almost a frivolous question.

Mr. McTernan: Your Honor, I hesitate to interrupt, but we are not relying simply on the matters raised in this motion to quash. I have indicated other points.

The Court: I think that I have taken the other points as I come to them and I will try and touch on them.

Mr. McTernan: All right.

The Court: I think that that point, as to the composition of the grand jury, is a frivolous point. In *United States v. Local 36* the question was tried before this court, extensive evidence was taken, testimony heard, and the question was presented by Mr. Margolis and the same firm of which Mr. McTernan is now or was then a member—I don't know which.

Mr. McTernan: Both, your Honor.

The Court —and it was thoroughly explored. The court wrote a long opinion.

The similar challenge was made before another judge of this court, a visiting judge, and both of us reached the same conclusion, that there was no systematic exclusion of any person or class or any of the categories which the Supreme Court referred to in *United States v. Thiel* or *United States v. Ballard*.

As to the second question, that the grand jury is

not conducting a bona fide investigation within the scope of its powers, which was set forth in the written motion yesterday, I do not think that is a substantial question because it states that it was instituted by the office of the Attorney General of the United States solely for political reasons and not for the bona fide purpose of investigating the commission of any crime.

The answer to that is this: there are laws upon the statute books. They are passed by Congress. It is the function and duty and power of the grand jury to conduct an inquisition or investigation. It is the function and duty, and sworn duty, of the Attorney General, the United States Attorney, and all officers of the Department of Justice, to enforce the law. It is the function and duty of persons who are citizens to be and appear before grand juries and to testify, unless the answer which they might give might incriminate them. Even assuming that some officer of the government might have some other motive or purpose, political or otherwise, that certainly is submerged—and I am not conceding that that is true—but even assuming it were true, it is submerged completely in the power which he has under his sworn duty to enforce the law.

So I do not think that that is a substantial question.

No. 3: That the moving parties are being denied due process by utilization of the process herein referred to under the Fifth Amendment to the Constitution in that they have been subpoenaed by action of the office of the Attorney General of the United States and his deputies and assistants, not for the purpose of conducting a bona fide grand jury in-

vestigation, but for the purpose of carrying out a plan and design to harass and annoy persons believed to be members of the Communist Party and to discriminatorily apply the law against such persons in such manner as to utilize every conceivable technical means of imposing punishment upon them. That point is a little bit obscure. It is a sort of a combination of charges and accusations that the office and functions and duties and powers of not only the grand jury but of the Attorney General, the power of the court for the issuance of subpoenas, are being misused for some purpose of taking personal satisfaction or imposing some personal inconvenience or punishment on people who may be in a position to know something and who may be in a position to give testimony.

Insofar as that is concerned, that feature of it is disposed of by what I said concerning point two.

Insofar as the other point which appears to be in here, and which was discussed at some length last night by Mr. McTernan—and I think also touched on by Mr. Margolis—that this is not an equal application of the law, that they are being denied equal protection of the law, I followed the argument closely in that connection and the theory generally seems to be, although it does not find whole support in all of the cases, that the due process clause and the Fifth Amendment carry with it the same provision which is put in the Fourteenth Amendment, but which is added in language which requires the equal protection of the laws to all persons. There is some occasional statement in the various cases that that does mean that. I do not think, however, that a reading

of all of the cases under the due process clause of the Constitution will convince one that that was the intention of the Supreme Court that it always meant that, that is to say, due process always meant that same thing that the equal protection clause means in the Fourteenth Amendment with regard to the power of the states.

But even assuming that it does, there is nothing to the point insofar as it is applied to these witnesses. Again, the grand jury is authorized and under a duty to investigate crime. Again, Congress has passed laws which must be enforced. Again, it is the sworn duty of the Attorney General and the United States Attorney to investigate crimes, to ascertain whether or not persons should be prosecuted. And, again, it is the duty of every citizen and every person in the United States to be a witness unless the answer to the question which is propounded to him might incriminate him.

As to that latter point, I came to the conclusion yesterday that insofar as the cases which counsel relied upon and the points and the authorities in his argument, that there could be no incrimination of any of these witnesses here by the answer of the questions which generally are, do you know the table of organization, do you know the officers, what is your occupation, and for whom are you an organizer. I cannot possibly see how the answer to any of those questions could possibly incriminate any of the witnesses who appeared here under the theory advanced by the defendants that the Attorney General now says that it is a violation of law to belong to the Communist Party.

This brings me again to the other point, which I think is your only other point which you touched upon, that the grand jury had no power to ask these questions because it would be a violation of the First Amendment, the right of free speech, the right of assembly, the right of association which is guaranteed by the First Amendment.

Again there I cannot possibly see how anyone can be excused from answering questions such as these that were asked by virtue of that amendment. There is no statute of the United States which makes it a crime to be a member of the Communist Party. There is a statute which says that if a person knowingly attempts or advocates the overthrow of the government of the United States by force and violence that it shall be an offense.

There are many cases, the Schneiderman case with particular reference to that matter, which point out, and in fact there are very few cases and very few statutes which have come within my knowledge and experience, which do not have the requirement that guilt is personal regardless of what organization a person may belong to, that no statute can make the mere joining of an organization a crime, that they must be shown to have a personal guilt, a personal intent to destroy the government of the United States by force or violence, and the like. And such it seems to me is what is charged in the indictments, copies of which were submitted here yesterday and are on file in New York.

Insofar as the other questions touched on by counsel, I think that I have expressed my views very briefly and certainly not formally on them.

One other thing I would like to say in this connection, having recourse again to the statement which I made about the duty of the grand jury and the duty of the Attorney General, I know, as we all know, that there are statutes of limitation which Congress has placed in all of the statutes which place a limitation upon the period of time within which a person may be prosecuted for an offense. It is necessary, therefore, that the investigative arm of the government, whether it be the United States Attorney or whether it be the arm of the court, to-wit, the grand jury, that they should be able to proceed without obstruction. If questions such as this can be raised by these witnesses there is no reason why every person who is called as a witness before the grand jury concerning anything at all cannot come down and raise these identical questions, come before the court, take the time of the grand jury, take the time of everybody else, on every single question which they might raise, and then if the court should stay the execution of the court's judgment the statute of limitations would run and the laws on the books would become mockeries rather than statutes which are required to be observed with all of the dignity and power and majesty of the law which, after all, is supreme.

The motion for a stay of execution is denied. Court is adjourned until 2:00 o'clock.

(Whereupon, at 12:05 o'clock p.m., court was adjourned.)

[Endorsed]: Filed Nov. 10, 1948.

REPORTER'S TRANSCRIPT OF
TESTIMONY

Los Angeles, California,

October 27, 1948; 10:00 o'clock a.m.

The Court: Ex parte?

The Clerk: Yes, your Honor. Mr. McTernan has a matter this morning.

Mr. McTernan: Your Honor please, we have presented and filed two motions with the clerk this morning. One is a motion to reconsider your denial of stay in the ten matters that were tried here Monday, and the other is a motion to vacate and set aside the sentence under Title 28 U. S. Code, Section 2255.

I notified Mr. Carter, the United States Attorney of this District, of my intention to file these motions, and gave him copies through Mr. Goldschein, about 9:35 this morning. They were advised that the matter would be taken up in open court this morning.

I don't see them here. I don't know what their intentions are.

If you wish me to ahead in their absence, I will proceed.

The Court: No. I have a criminal case for trial this morning and there is a panel of jurors here, the defendant is here, the lawyers are here, and they are ready for trial.

This matter of course is important to you, but every criminal case is important to the persons involved. I do not [288] know why I should extend special privilege to you or to your clients to give them

consideration over everybody else when the court's calendar has been set.

Mr. McTernan: I think this is a very short matter, your Honor. The motion under Section 2255 raises nothing new. It is more or less a formal step necessary, as I read the Code, to taking the matter before any judge of the Court of Appeals.

The motion for reconsideration does involve new matters, but I think it would not take very long to present them.

The Court: I will have to proceed with the calendar.

Mr. Wirin: May I be heard for a moment?

The Court: On this matter?

Mr. Wirin: It is on this matter.

The Court: I will have to proceed with the rest of the calendar and this case will have to be heard when I can hear it. Now I do not know when I can hear it.

Mr. Wirin: That is what I wanted to know. I wonder if your Honor could hear it at 1:30.

The Court: I sat here until midnight as a special consideration to the witnesses and everybody concerned, and yesterday I was advised I had violated the due process and the rights of the witnesses. So perhaps this matter just better take its regular course.

Mr. McTernan: We didn't ask for any special accommodation, your Honor. I would like the record to be clear on [289] that.

The Court: The record will show, however, that

most of the time was spent in listening to the arguments advanced on behalf of the witnesses.

Mr. McTernan: Which I assume we had the right to do.

The Court: Which you have a right to do and which right was extended.

Mr. Wirin: I have one further matter. When this court does set the matter I should like then to present an oral application to appear amicus for the court to consider at that time. I would like to appear as amicus to participate very briefly at the appropriate time.

The Court: I do not know anything about that. I suppose the United States Attorney ought to be here in connection with the whole matter.

Mr. Wirin: Yes, I would say so.

The Court: This matter will just have to await its place on the calendar. I do not know how long we will be in the trial of the criminal matter.

Mr. McTernan: Are you saying that this will have to wait until after the procedure of the trial?

The Court: I do not know. If I can find time between now and then I will hear it.

Any other *ex parte* matters?

The Clerk: No, your Honor. [290]

Los Angeles, California

October 27, 1948; 12:05 o'clock p.m.

Mr. McTernan: Your Honor, before you leave the bench, will you hear me?

The Court: Yes.

Mr. McTernan: You ordered two persons, Mrs.

Forest and Mrs. Sherman, to surrender at noon to-day, having granted them a stay of execution from Monday night.

I have handed the clerk two affidavits, one by each of them, in support of an application for further stay because of their home necessities in connection with the care of their children.

Mrs. Sherman is the mother of two children, one a teen-age girl and one a girl of four years old. Her husband is a war veteran and is incapable of completely supporting the family and she has to help with the support. And there is need also for her at home to care for the children and give them the care to which they are entitled and which they require.

The Court: What does her husband do?

Mr. McTernan: I can find out for you. She is here.

Mrs. Sherman: It is in the statement there.

The Court: Is this the Forest affidavit?

Mr. McTernan: No, the Sherman affidavit.

The Court: I am reading the affidavit of Dorothy Baskin [292] Forest. What does her husband do?

Mr. McTernan: Her husband is out of the state.

The Court: What does he do? You are claiming hardship. Maybe he is a millionaire. What is his occupation?

Mr. McTernan: Your Honor, I am awfully sorry, but this involves the very questions that were involved before the grand jury. He is an organizer, and I can't answer "an organizer for what," but I can tell you from my own personal knowledge that his income is a very limited one. They are not in

position, as the affidavit states, to hire nurses or any other persons to care for the children.

The affidavit of Mrs. Forest shows the family was about to be re-united by Mrs. Forest and the child going where the husband is and living there, and this was interrupted by the service of the subpoena. She works part-time and cares for the child the rest of the time.

The Court: What is her part-time job?

Mr. McTernan: I am informed, your Honor, that this also involves the situation similar to that presented before the grand jury. She is engaged in organizational activities and cannot state what organizational activity. I know the facts concerning her limited income.

There is also in attendance, your Honor, if your Honor cares to inquire into the matter, a physician who is prepared to testify concerning the fact of children of tender years [293] when they are deprived of the care of their mother.

The Court: Maybe that is what is wrong with me. I was deprived of the care of my mother when I was of very tender years, and father too.

Mr. McTernan: I am very sorry, your Honor.

The Court: What is the occupation of the husband of Mariam Brooks Sherman? It states he is a commission salesman. What does he sell?

Mr. McTernan: Mrs. Sherman, will you step forward?

(Conference between attorney and client.)

Mr. McTernan: Mrs. Sherman advises me that

her husband is a commission salesman of restaurant equipment. Mrs. Sherman tells me that his average earnings are approximately \$40 a week.

The Court: Mr. Reporter, I understand that Mr. McTernan has ordered a transcript of the proceedings had the other night. Can you estimate when they will be finished?

The Reporter: By Monday morning at the latest, your Honor.

The Court: You have filed a notice of appeal. When did you expect to perfect your appeal?

Mr. McTernan: We can perfect it, your Honor, very rapidly after the transcript is available. I imagine it would be a rather lengthy transcript, however.

The Court: Yes. I am sorry that the reporter could not [294] have gotten it out sooner, but there are facilities provided for getting a transcript immediately if counsel desire it. They could have ordered a daily copy transcript.

Mr. McTernan: We discussed that with the reporter, your Honor, and he said he was unable to turn out a daily copy until after midnight.

The Court: You have to order your daily copy in advance so that other reporters can be hired.

Mr. McTernan: We didn't anticipate that we were getting into the kind of session that occurred.

The Court: And the reporter, like the other attaches necessary in attendance on the court, has to devote his time to other litigation.

Mr. McTernan: Yes, I understand.

The Court: When, after the transcript is ready, will you have your appeal perfected

Mr. McTernan: Your Honor, I can assure the court that it will be prepared with all possible speed. I can't say definitely, but I should think it would take a couple of days. I know the transcript will be quite long, we went through a long number of hours, but I will do everything in my power to perfect the appeal as quickly as I can.

The Court: I will stay the execution of these two women solely on account of the fact that they are the mothers of children and have not yet made arrangements for their care. [295] I want to emphasize, however, that this is a civil contempt proceeding and, as the Supreme Court has said, they carry the key to jail in their pockets. Any time they want to get out all they have to do is comply with the order of the court. They are not committed for any definite period of time.

I will stay the execution as to these two women, that is to say, Mrs. Forest and Mrs. Sherman, until 6:00 o'clock next Monday, November 1st.

Mr. McTernan: Very well, your Honor. Thank you very much.

I would like to tell the court that I can't be sure that I can get my appeal perfected on Monday because I don't know when the transcript will be ready.

The Court: I will stay it until that time and give you an opportunity to get your transcript on appeal ready so that you may apply to the other court for any relief that you desire.

Mr. McTernan: Your Honor, would you be willing to extend the stay a couple of days, because we will have to probably go to San Francisco.

The Court: There is a circuit judge available here at all times, I understand.

No, I would not extend it beyond that. I think they can make their arrangements in the meantime to find somebody to care for their children. Again I want to point out that they [296] carry the key to the jail in their pocket. They are not committed to jail for any definite period of time. I have passed on the legality of their objections here and it is a very simple thing for them to get out.

Mr. McTernan: They carry their constitutional rights in their hearts, too, your Honor.

The Court: Court is adjourned.

(Whereupon, at 12:15 o'clock p.m., court was adjourned.)

[Endorsed]: Filed Nov. 10, 1948. [197]

[Endorsed]: United States Court of Appeals for the Ninth Circuit. No. 12217. Samuel Harry Kasinowitz, Henry Steinberg, Ben Dobbs, Appellants, vs. United States of America, Appellee. No. 12221. Lillian Adele Doran, Phillip Bock, Irving Caress, Robert Blair, Merle Brodsky, Frank Spector, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: April 7, 1949.

/s/ PAUL P. O'BRIEN,

Clerk, United States Court of Appeals for the Ninth Circuit.

